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BY

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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CASE LAW IN FRANCE.

[*Contributed by* Dr. Marc Ancel, *Secretary-General of the Institute of Comparative Law of the University of Paris.*]

There exists a traditional difference between the English and the French law, or rather, speaking more generally, between the English system and the civil law system ; the English system is based upon a body of unwritten law, while the civil law has for its basis the *lex scripta*, of which the French codes generally and the *Code Civil* in particular are perhaps the most striking example. Now English unwritten law—be it Common Law or Equity—is judiciary law built up in the course of centuries by a continuous series of decided cases. The difference, therefore, is that between case law and codified law. Though this is true, yet it is necessary to point out that the problem is yet more complicated, since in France also there exists an important body of case law. It is this French case law which we propose to examine, in close comparison with English case law.

A remark is necessary here. During the past forty or fifty years much has been written in France on the sources of law ; and nearly all law writers have laid stress on the importance of judicial decisions —which we call " jurisprudence "—in the elaboration of French law. The works of MM. Gény, Lambert, Bonnecase, Perreau [1] are well known, as well as that of Dr. C. K. Allen,[2] who has thrown new light even upon French law. We do not intend to reproduce here the conclusions reached by these eminent jurists ; but we think it useful to study the problem afresh, though from a more modest point of view. They considered the subject broadly and asked what were in France the *fontes juris*, and whether judicial decision may not be considered as a real " source of law." As to this there are still disputes in France which one may compare with the historic English controversy as to whether the common law judge really *made* the law, according to Austin's opinion, or only *declared* it, as was affirmed by Blackstone.

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[1] F. Gény, *Méthode d'interprétation et sources en droit privé positif ;* Lambert, *Etudes de droit commun législatif ;* Bonnecase, *Introduction à l'étude du droit, Précis de pratique judiciaire et extrajudiciaire, Supplément au Traité de droit civil de Baudry Lacantinerie,* t. I, n° 123 and following ; Perreau, *Technique de la jurisprudence en droit privé.*

[2] *Law in the Making* (Oxford, 1927).

We do not propose to deal with the subject so broadly. Whether the English judge creates the rule of law which he formulates for the first time in a new case, or simply declares it, one admits without difficulty that the principle of law contained in a decided case will be binding on future judges ; the case will be relied upon in business negotiations and in everyday life ; it will consequently have an enormous importance from a merely positive point of view. It is this positive point of view which we shall adopt in order to examine the problem in French law, whilst trying to illuminate it by comparison with the solutions of English law.

But for this purpose it is necessary to examine first the obstacles presented in France to the admission of case law ; secondly, we must try to find out to what extent such admission has nevertheless been possible in France ; and lastly, what is the position of case law in the French system as compared with the English.

Obstacles to the Admission of Case Law in France.—It is *prima facie* a paradox to speak of case law in France. As a matter of fact, a series of characteristic elements of French law seems to make the recognition of case law impossible. It is necessary to consider them in order to understand their precise importance in the French system.

We shall not examine here the nature of English case law ; but we may assume that when compared with the French system, it is mainly made up of two essential elements : the first being the absence of a uniform legislation and the second the theory of judicial precedent.

Historically, the growth of the common law was due to the absence of any uniform legislation. There existed no general code for the whole kingdom ; there had been no general reception of Roman law, so that during two or three centuries after the Norman Conquest there existed great uncertainty as to the customs which ought to be applied. It is at that time that the English judges, by an admirable effort, elaborated the fundamental rules of the common law. Even to-day, written legislation is far from covering the entire field of English law, and to a very large extent case law remains a necessity.

On the other hand, whatever may be the origin, meaning and scope of the rule *stare decisis*, whatever its place in the hierarchy of authorities, it must be admitted that the rule results in giving considerable force to the principles laid down by judges. Without judicial precedent, English law would undoubtedly never have been what it is.

Now these two essential and characteristic elements of the English system are unknown in France. France is a country where legislation, as a rule, is complete and uniform, and where the authority of the decided case is limited to the particular case settled by the judgment. The very conditions of the recognition of case law seem to fail. The traditional causes for this are worth recall.

The first is the importance of the Napoleonic codification. Between 1804, the date of the *Code Civil*, and 1810, the date of the Penal Code, five codes were promulgated and these codes, revised or completed on certain points, but the broad lines of which have remained unchanged, still govern France. This codification was of considerable importance and influence: it realized the unity of French law, which did not exist in 1800. The unification of the law which in England had been largely due to the efforts of the courts of justice during the twelfth and thirteenth centuries, was therefore realized in France only in the nineteenth century and through the enactment of a new written legislation. On the other hand, Napoleon's legislation classed anew all the juridical rules in an apparently definitive manner ; and it enjoyed a well-known success and expansion abroad.

This was a primary reason why France should not admit case law. Yet one tends to exaggerate the influence of the *Code Napoléon*. If, before 1804, France had possessed a sound tradition and doctrine of case law, the codification of the First Empire would not have sufficed to stop it. One often forgets, even in our country, that France possessed before the Revolution a long tradition of written law. It was not in 1804 that the rise of a French Common Law was made impossible, but in the sixteenth century, when François I^er^ ordered that all the customs should be put in written form. From that moment customs ceased to be declared or enforced through the decisions of judges : every province had its separate code and France became a land of codified law. The attempts of Louis XIV in the seventeenth century, and the great *Ordonnances* of Chancellor d'Aguesseau in the eighteenth, were only preparatory stages for the drawing up of the great unified Codes at the beginning of the nineteenth century.

So there existed before the Revolution a strong tradition of written law in France. The Revolution of 1789 emphasized the movement. One of the principal claims of the *Etats Généraux* was the demand for a constitution—that is, a *written* constitution—and a Code. According to M. Gény's just expression, legislation was considered in the eighteenth century, "like a divine work, as a perfect and complete revelation of positive law, which ought *a priori* to be self-contained, and cast in a system of mathematical exactitude."[1] The result was, at the time of the Revolution, a triumph of the principle of legality, the principle that only written or statutory legislation can create a new rule of law. It is in this sense that Art. 5 of the Declaration of the Rights of Man must be read: "What is not forbidden by the *law* cannot be prevented, and nobody can be compelled to do what it does not ordain." That was a principle, not only of law but of political philosophy: written law, in the form of a statute, comes from Parliament, and parliamentary assemblies are said to represent the whole country which elected them. Hence the affirmation which has been traditional in France for more than a century that "law is the expression of the general will of the nation."

All this tends to reduce considerably the part of the judge. In such a system, the judge is not, as Blackstone was saying in England, "the living oracle" charged with the formulation of rules of law; he is the servant and almost the slave of the text of written law. One had not forgotten in 1789 the abuse of power exercised by the great courts of justice (the *Parlements*) of the *Ancien Régime;* judges were consequently forbidden to interfere in the execution of laws; nor were they permitted to give decisions in a general form, by laying down a rule which would serve for a distinct category of cases, forming what under the *Ancien Régime* was called "arrêt de règlement." The *Tribunal de Cassation* itself was attached to the *Corps législatif,* to which it had to give every year an account of its mission.

This primitive rigour has necessarily disappeared. But something of it still remains, and particularly perhaps the idea that the interpretation of law does not necessarily and exclusively belong to the courts. For a considerable time, great efforts were made in France to charge the legislative body itself with this interpretation. Even to-day the same feeling explains in great part the influence of what we call *doctrine,* that is to say, in English terms, the extra-judicial doctrine. It would be of great interest to make a full study of the part played in France by extra-judicial doctrine ; only its evolution and principal aspects have been studied. One of those who have thrown the best light upon its importance is unquestionably Dr. C. K. Allen, just because in *Law in the Making* he considered the question from a comparative point of view. He says that in France " an extremely important part is played by extra-judicial and extra-legislative doctrine." He adds that " the great commentaries on the Civil Code are scarcely less authoritative than the Code itself." This opinion has been criticized by Professor Lambert, who certainly is right in saying that " the authority which the extra-judicial doctrine had claimed for itself, remained theoretical because the usage of the courts never was willing to recognize it."[1] As will be seen later, the practice of the courts in France has in a good many cases rejected the solutions of law writers, which therefore are not " authoritative " in the sense in which for instance an article of the Civil Code is. But surely that is not what Dr. C. K. Allen wished to say. He was struck by the fact that in France writers are in the habit of giving their own interpretation of the law, which is sometimes contrary to the solutions of the courts, but which they nevertheless consider as the only real expression of French law. On many important points, such as, for instance, the theory of *astreintes*, which will be explained later on, or the doctrine of *renvoi* in private international law, there exists a doctrine of the courts and one of the law writers. So you can find in France a law which is printed in books and taught in universities, and which yet differs much from, even when not contrary to, the law as applied by the courts of justice. Writers nowadays take care to state not only their own opinion, but also the opinion of the *jurisprudence*, but yet they put forward their solution as the only legal one ; from this point of view, whatever Professor Lambert may say, it does not seem to us that the extra-judicial doctrine has ceased to claim the authority which it demanded for its writings at the beginning of the nineteenth century.

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[1] *Méthode d'interprétation et sources,* I, n° 96.

It has been necessary to describe the relative importance of extra-judicial doctrine and of judicial decisions, because this relation is one of the characteristic features of the French system, and explains why the importance, or even the existence, of case law in France has not always been recognized. During the past fifty years, French writers have certainly insisted more and more on the importance of judicial decisions in the formation of the law. However, it is just to say, as does Dr. C. K. Allen, that " modern French theory is far from conceding any absolute authority to decided cases." French writers refuse to admit in general that judicial decisions may be an independent source of law, and certain famous theorists, such as Esmein, in considering the question, violently rejected any adoption in France of a system comparable to that of the Common Law.[1] This opposition to the admission of case law in France has remained traditional and is founded, from a theoretical point of view, on the supremacy of the law (that is to say, of *written* law) and on the theory of separation of powers. It accounts for some of the peculiarities assumed by case law in France.

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[1] E. Lambert and Max J. Wasserman, " The case method in Canada and the possibilities of its adaptation to the civil law," *Yale Law Journal* (November 1929), vol. xxxix, p. 1 and following.

For, in spite of all that has been said, there is a French case law. We are going to see now how it could appear, and what it is.

To what Extent Case Law exists in France.—We have already said that during the last half-century the theories relating to the formation and the interpretation of law have become considerably modified. It is possible to refer on this point to the study published in the Journal of Comparative Legislation by Professor Bonnecase, who has particularly studied the question.[2] During the greater part of the nineteenth century the exegetical school predominated even in practice. The texts of the Codes were strictly observed and literally construed. To-day, all recognize the growing importance of judicial decisions, which is commonly remarked as one of the characteristics of modern French law. How did our case law succeed in overcoming the obstacles which we enumerated ?

First of all, experience proves that no codification, however carefully studied it may be, can be complete. Some gaps, deficiencies or obscurities soon appear. A striking example of this was furnished by the German Civil Code, which was soon found to need a large complement of judicial interpretation. The same thing happened, though perhaps more slowly, with the *Code Napoléon*. Moreover, in proportion as it grew older, the Code of 1804 ceased to respond to the new needs of society. Thus there appeared in our country a growing number of cases of first impression for which no provision of the law existed. The judges were bound, nevertheless, to decide these cases, since Art. 4 of the Civil Code says: "A judge who refuses to decide a case on the pretext that the law is silent, obscure or insufficient, may be prosecuted as being guilty of a denial of justice." The law itself therefore obliged the courts to furnish a solution not provided by legislation. This was a remarkable exception to the principle laid down by Art. 5 of the Civil Code, which forbids the judge to substitute himself to legislation.[1] In fact, by reason of the absence of statutes, French courts have in a good many cases been obliged to build up important doctrines, such as nearly all those of private international law, for instance, or the law, of life insurance, about which Dr. F. P. Walton said very well that, in order to establish it, "the courts have fought their way to it, if we may say so, over the prostrate body of the Code." [2]

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[1] Report to the Revisal of the Civil Code Commission constituted in 1905.

[2] " The Problem of Legal Interpretation in France," *Journ. Comp. Leg.*, Third Series, vol. xii, pt. 1, p. 79.

Besides, as legislative activity increased, statutes lost their primitive rigour and completeness. Even in the Napoleonic codification certain provisions merely refer to customs, *e.g.* Civil Code Arts. 1736 ff. (leases), Art. 1134 (contracts). In these cases legislation seemed spontaneously to surrender the first place to other "sources of law," which could hardly express themselves save through the medium of the courts. This method has become more and more frequent. Modern statutes often give to the judge considerable power, which is no longer consistent with the narrow ideas entertained in 1789 or 1804 as to the part to be played by the judge.[3] Legislation often only lays down a general principle, the applications of which are left to be settled by judges. In fact, the numerous enactments, of great practical importance, which regulated, during and after the war, the law of landlord and tenant, necessarily gave rise to an enormous mass of case law, and the solutions given by the courts on the interpretation of these statutes have, so to say, become an integral part of them.

The courts in France have come to possess, with regard to the written law, a power of interpretation often much greater than that recognized as proper in the same case in England. This judicial interpretation goes sometimes as far as to give solutions contrary, it is certain, to those which were in the mind of the framers of the Code. An example of this practice, which is well known now, even in England, is that of the interpretation of Arts. 1554 ff. of the Civil Code, which declare the real estate settled as the wife's dowry to be inalienable: the practice of the courts gives the same character of inalienability to the wife's moveable property, though this had been treated by the Civil Code as beyond the limits of its regulation. So also, in the articles consecrated to torts, there is a paragraph worded thus: "A person is responsible not only for the damage which he causes owing to his own act, but also for that which is caused by the acts of persons for whom he is answerable or by things which are in his custody" (Art. 1384, par. 1). The sole object of this phrase when it was drawn up was to serve as an introduction to the provisions which follow; it had not by itself any particular signification. But the provisions which follow made no provision for payment of damages for injuries caused to a person by an object belonging to another person. Where injury had been so caused, the victim, in order to receive compensation, was bound to prove that he had suffered damage by the fault of the person who was in charge of the object, according to the general principle of Art. 1382.[1] This proof of a fault was often difficult, and thus the victim obtained no relief. In order to avoid this inconvenience the courts fell into the habit of applying Art. 1384, par. 1. They decided that when a thing was a cause of damage to another person, the keeper of that thing was to be presumed to have committed a fault. On this new principle has been built up the whole theory of liability in case of motor accidents, which, as may be readily supposed, possesses considerable practical importance. The presumption of fault on the part of the author of the accident thus became stronger and stronger, so that the matter came to be ruled now not so much by Art. 1384 of the Civil Code as by a series of judicial decisions, among which a judgment of the Court of Cassation of 1924 constitutes the leading case; that series has been definitively closed, after a resistance shown by several Courts of Appeal, by a judgment of the full Court of Cassation (*toutes chambres réunies*) of February 13, 1930. If we had time, we could show how, from 1924 to 1930, this judicial doctrine has been elaborated slowly, progressively, by a succession of *judicialia dicta*, according to a method which may be well compared to the method of the Common Law.

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[1] Art. 5. Judges are not allowed to decide cases submitted to them by way of general and set decisions.

[2] *Journ. Comp. Leg.*, Third Series, vol. x, pt. i, p. 150.

[3] As a recent example, Art. 3 of the Law of July 12, 1933, on the revisal of commercial leases, runs as follows: "the rent shall be determined by taking into account all the elements of appreciation," which amounts to giving the judge liberty to fix the new rent according to his personal appreciation.

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[1] Art. 1382. Every act whatever of an individual which causes injury to another obliges the one owing to whom it has occurred to make up for it.

Hitherto we have been in the domain of interpretation of texts. Although Art. 1384, par. 1 was never intended to impose the liability which the Court of Cassation has based upon it, nevertheless the word "responsible" appears in the phrase. The practice of the courts has gone, however, still farther. In certain cases it has built constructions which were not even grounded on the basis of any precise text, and which sometimes even were in contradiction with a text. Thus Art. 1142 is worded in this wise: "every obligation to do or not to do resolves itself in damages, in case of non-performance on the part of the debtor." French law as a rule does not know the equitable remedies of specific performance, or injunction. But the judges have contracted the habit, notwithstanding protests on the part of law writers, to condemn a person who is under an obligation to do some act to pay damages at the rate of so much a day for each day for which performance is overdue. At the end of a short time, the sum becomes so heavy that the debtor may prefer to perform his engagement; then the judge reduces the amount of the damages or even excuses payment altogether. Such is the procedure called *astreinte*, which has a purely judicial origin, and has been created and regulated solely by decided cases. This is not a solitary example; one might find many others by examining the way in which the courts make use of broad principles and ideas of natural justice such as good faith, enrichment without cause, fraud, abuse of power, public order and morals.

The result is the formation in France of a true judiciary law, which possesses as much force and certainty as the English Common Law, or the provisions of a statute. In fact, only an Act of Parliament could, in France, reverse such judicial doctrines as the doctrine of *astreintes*, or that of civil liability founded on Art. 1384. A few French statutes have been enacted solely to reverse a legal principle established by the courts, and even such statutes have not always succeeded in modifying judicial doctrine. Thus, the question had often been asked, whether an employer when dismissing a workman or an employee without reason is liable to pay him damages. The French courts had decided that to obtain this compensation, the workman must prove that the dismissal constituted a *fault* of the employer within Art. 1382 of the Civil Code. This proof, again, was often impossible. A statute of 1890 has, therefore, provided that the abusive cancelling of a contract of employment is a ground for damages. The courts continued nevertheless to apply the former system, which, indeed, was not directly contrary to the literal meaning of the statute of 1890. The French Parliament, obliged to intervene a second time, declared in 1928, that in such a case the judge must in his judgment state the reasons invoked by the employer. This amounted to a transfer of the burden of the proof from the employee to the employer. The construction of this new statute, however, is not yet established, and it is not certain that the former judicial doctrine will not be still maintained, at least in part.

Case law, therefore, possesses in France considerable force. Little by little, it even comes to have its own characteristics and method. A modern writer, M. Perreau, has devoted an important work to the study of technics of judicial doctrine.[1] Just as certain writers of books on jurisprudence in England have distinguished several sorts of precedents,[2] even so M. Perreau distinguishes in France several categories of judicial decisions: the ordinary judgments which settle the case in hand according to established rules, the *jugements d'espèce* where the solution is based on pure considerations of fact, and finally the *arrêts de principe* or judgments containing a legal rule, in which the judge had to examine a new problem of law and give a complete and detailed answer. These *arrêts de principe* are the leading cases of French case law. But we think that it has not yet been sufficiently remarked that the method of French judgments is undergoing a slow transformation. Until lately one did not find in a French judgment a discussion of judicial precedents. The judgment contained the enunciation of the legal text applicable and the interpretation which the judges intended to give; but the judges did not ground their opinion, in general, on former decisions separately quoted, but contented themselves with alluding to the general doctrine resulting from judicial decisions. In certain recent judgments, on the contrary, judges in support of their decision invoke the doctrine of a particular judgment of the Court of Cassation or of a Court of Appeal.[3] In certain cases one can see them hesitating between several interpretations given by the courts; they examine or reject the precedents pleaded. One finds even, in a recent judgment of a Court of Appeal deciding a very disputed question concerning negotiable instruments in case of bankruptcy, that the appeal is dismissed on the ground that, a judgment of the Court of Cassation having been invoked, "the judges have made a just application of the terms of the judgment." [1] Here a judicial solution is applied just like an article of the Code: the *ratio decidendi* of a former judgment is a sufficient justification for the judicial decision. We are very far from the traditional difference between French law and English law and the rather strange affirmation of Dr. C. K. Allen, that French judgments are not *motivés*.[2] The analogy must not be carried too far. Still a judiciary law founded on precedents exists in France. Practitioners do not ignore or misinterpret the fact, and particularly the *Avocats à la Cour de Cassation*; they prefer to have a judgment of the court which they can invoke, even by way of simple analogy, to the most categorical opinions of law writers.

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[1] Perreau, *Technique de la Jurisprudence en droit privé.*

[2] Salmond, *Jurisprudence*, pp. 159 ff.

[3] For instance, the Tribunal de la Seine, having to determine whether the act of a third person can discharge a carrier from the obligation resulting from his contract, invokes particular decisions of the Court of Cassation (Trib. Seine, 23 février 1932, in *Clunet*, 1933, p. 669).

We have been speaking solely of the part played by case law in private law. The demonstration would have been still more conclusive if we had considered administrative law, which is almost entirely case law. But we have not done so for three reasons: (1) There is no code of public or administrative law in France and consequently that part of our law occupies a special situation in the bulk of French codified law; (2) the courts of administrative law are in France special jurisdictions, among which the *Conseil d'Etat* is the most important and almost the only one from the point of view of the development of the law; (3) the methods of administrative law differ much from those of private law. We omit it therefore. But it would be possible to show that even in criminal law there is present also a noticeable infusion of case law. The fact is all the more important since, by virtue of the rule *nulla poena sine lege*, every one in France admits that the power of appreciation pertaining to judges is reduced in criminal affairs to the strict interpretation of written law. But we have tried to treat this question elsewhere[1] and what we are saying here is consequently good only for private law.

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[1] Cour de Douai, 5 mars 1931, *Annales de Droit Commercial*, 1931, p. 348.

[2] Of course, Dr. Allen meant that French judgments contain no discussion of precedents, whereas the "confrontation of competent authorities" constitutes the real basis, the "motifs" of the English decisions. The learned author seems here to forget that France being ruled by codified and written law, the only technical basis of a French judgment must be the interpretation of a particular article of the Statute Book. In fact, as is said above, the solutions of previous decisions are very often discussed in new cases, though not in the English form of judicial discussion. The French judge only mentions the interpretation of a previous judgment, without quoting it in particular, and accepts or rejects it from the general or abstract point of view.

The Position of Case Law in the French System.—We hope to have proved that case law forms an important element in French positive law, and to have shown how such case law has been made possible in France. There remains to be determined the true nature of this case law. We think that this cannot be done otherwise than by a comparison with English case law. The comparison, to be complete, would have to be developed at length. We shall, therefore, limit ourselves to the study of three points, viz. the domain of French case law; the method of this case law; and the control of this case law by the superior courts.

In the first place, the domain of case law. It is possible to speak of the *province of English case law.* There really is in England a province of case law, that is to say, there is in the land of legal doctrines a territory which properly belongs to judiciary law. The law of contracts and that of torts, for instance, are notable parts of this province; on a juridical map of the English system one might tinge with a special colour the territories of case law. No doubt, especially during the past century, Acts of Parliament have annexed a good many of them, and often an old province of case law has passed into the domain of statute law; but there still remain some territories of pure case law.

It is not the same in France. As a rule legislation covers the whole field of private law—except for a few matters belonging to the conflict of laws. Case law did not develop freely in the absence of statutes, but on the contrary, under the shade of statutes, and generally between two statutory provisions, which were for judiciary law both a support and a limit. So that it is inexact, for instance, to say that the French law of torts is unwritten or judiciary law, seeing that it is based on five essential articles of the Civil Code (1382 to 1386). Case law here has, as it were, been grafted on legislation. Though the law of insurance was, prior to the statute of 1930 (very largely an act of consolidation), almost entirely judge made, yet it was based on an extensive interpretation of Article 1121 of the Civil Code. Consequently, there is no independent province of case law in France. Such is the first notable difference with the English system.

Let us pass on now to the method of case law. The dependence of French case law on written legislation accounts for the characteristic method of its formation. English case law possesses a particular, original method which consists essentially in discovering, among the competent authorities, the precedent which can serve as a basis in order to decide the case in hand. Sir Frederick Pollock and more recently Dr. C. K. Allen have given explanations as to this method of particular interest to continental jurists. Dr. C. K. Allen in particular has opposed the deductive method of the countries of codified law to the inductive method of the countries of case law: "when the French judge has to find his master principle in formulated propositions of abstract law, the English judge has to search for it in the reasoning which has been applied to particular facts."[1] The writer, on proceeding to the examination of French law, has inferred from this, as already mentioned, that French judgments do not contain any reasoned exposition, and that only the notes contained in the Reports, such as those in Sirey or in Dalloz are *reasoned*, that is to say, contain an analytical examination of judicial precedents. This opinion is certainly not acceptable to a Frenchman, who is always tempted to think, on the contrary, that there are no "reasons" (*motifs*) in the English judgments where the *ratio decidendi* must be sought for amidst numerous *dicta* of the judge instead of being expounded in concise and vigorous terms.

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[1] Marc Ancel, "La création judiciaire des infractions pénales en droit anglais et en droit français," *Bulletin de la Société de Législation comparée*, 1931, p. 91.

In fact, the method is very different. The French judge does not express his personal opinion on the point of law; he pronounces an impersonal decision, which is always based on the written law. Even when, exceptionally, the French judgment is founded on judicial precedents, it still appears as a construction of the *lex scripta*. The Court of Cassation has decided that no appeal to it for violation of the *jurisprudence* is allowed[2]; there must be a violation of the *law*. Consequently, when the Civil Code is mute and the judges are called upon to decide a new point, they pretend to do so by means of a construction of some text, and, if necessary, some inapplicable text of the Code. Even the doctrine of *astreintes* has been sometimes grounded on an article of the Code of Procedure, which most certainly did not provide for them at all.

Judiciary law, when it exists in France, has therefore a purely supplementary character, and is concealed under the appearance of a simple construction of texts. M. Gény, in his remarkable study of the sources of the law, has affirmed that when the written texts are silent, the judge must resort to "free scientific research," which allows him to elaborate directly new legal rules. This doctrine has not been admitted by the courts, who always deny that they are making law and make it only in invoking the *lex scripta*. Judges seem to be inspired, on the contrary, by the doctrine of another great French writer, Saleilles, whose motto was: "Beyond the Civil Code but through the Civil Code." When the judge lays down a new principle not formulated in the Code, he bases himself always, in order to justify it, upon the already existing provision of the Code.

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[1] *Law in the Making* (1927), p. 108.

[2] December 21, 1891, in Dalloz, 1892, 1, 543.

The method possesses a certain advantage, since it results in submitting the "interpretation" of law to the control of the Court of Cassation. We have just observed that in fact this control is only possible when a violation of the written law is pleaded. In this way all the French case law is controlled by the Court of Cassation. But also from this point of view there exist serious differences between French law and English law.

In England, the question is simpler, because the hierarchy of the courts is completed by the theory of judicial precedent. A decision of a superior court is imposed upon inferior courts, so that a case judged by the House of Lords, for instance, since the House considers itself bound by its own decisions, is practically of the same force as an Act of Parliament.

In France the question is much more complicated.

The control of the Court of Cassation is subjected to four essential limitations, which result from the general principle of the independence of the courts with respect to one another.

1. No former decision of a court can be binding upon another court. The courts are not subjected to a judicial hierarchy as far as judgments are concerned; they are only subjected to the law, that is to say, the *lex scripta*.

2. When a decision has been quashed by the Court of Cassation, the judgment is sent back to another court of the same rank as that from which the appeal emanated, nor is this itself obliged to accept the doctrine of the Court of Cassation. It may decide in a contrary sense. In that event, the case may go back on a second appeal to the Court of Cassation, this time sitting as a full court (*toutes chambres réunies*). Only the decision of the full court is binding upon the judges to whom the case is sent back.

3. The judgment of the full Court of Cassation is binding only in the particular case decided. It does not form a judicial precedent,

and an inferior court, even a *Juge de paix*, can refuse to follow it in a subsequent case.

4. Since the Court of Cassation exercises its control only as to the interpretation of the law, its control is limited strictly to points of law. Questions of fact escape it, and are subjected to what the Court of Cassation itself calls the *sovereign power* of the judges of the courts below. The distinction between questions of fact and questions of law is therefore a capital one for the Court of Cassation.[1] This is a very important limit to the power of the Court of Cassation. Thus, for instance, questions as to the place where and time at which contracts by correspondence were formed, are considered by the Court of Cassation to be questions of fact, to be determined exclusively by the inferior court.

English writers have criticized this system, but no French jurist would be ready to abandon it. The independence of judges and even of the court to which the case is sent back (*Cour de renvoi*) are secured, and this ensures a fuller examination of the question at issue. The Courts of Appeal are naturally loath to act in opposition to the Court of Cassation; but when they do so, and oblige it to decide *toutes chambres réunies* (in full court), this shows that the question is of particular importance. The Court of Cassation is thus obliged to reconsider the problem, just as under certain constitutions it is possible to demand a new deliberation in the legislative assemblies. The decision pronounced by the full court thus possesses a considerable moral value. Moreover, the absence of binding force on the part of the decided case allows judicial doctrine to evolve so as to adapt itself to new necessities or to the ever-changing needs of business life without being obliged to set aside an embarrassing or obsolete precedent by means of artificial distinctions. From this point of view, one may say that French case law is more flexible than the common law itself. Finally, regarding the Court of Cassation, its restriction to questions of law gives greater strength to its decisions; the rule of law is laid down in pure form, abstracted from considerations of facts.

The limitations are serious; still they do not prevent the Court of Cassation playing a dominant part in the elaboration of case law such as it exists in France. There is a current formula, to be found in most textbooks, to the effect that the greatest task of the Court of Cassation is to secure the unity of judicial doctrine. It is the regulating organ, which by its control of judicial decisions—for the Court of Cassation may be said to judge the judgments, not the cases—imposes a uniform solution in place of the varying solutions which might be given by the twenty-six Courts of Appeal. Very often, when a question has been long disputed before the courts, and a judgment of the Court of Cassation is pronounced, that question is considered by practitioners as being definitely settled, and the practice adapts itself to the solution thus pronounced. Not infrequently big companies, such as insurance companies, take to the Court of Cassation even a minor suit, solely in order to obtain a decision on a question of principle, and thus fix the law on a doubtful point. In such a case practitioners await a judgment of the Court of Cassation much in the same way as the more abstract jurist anticipates the provision of a statute.

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[1] See the remarkable essay of M. G. Marty, *La distinction du fait et du droit.*

This is not an abuse of practice. The *lex scripta* itself has given the Court of Cassation such a regulating power, and has provided a sanction by means of a characteristic institution, the appeal in the interest of the law (*pourvoi dans l'intérêt de la loi*) which was regulated by a statute of the Revolutionary period.[1] Let us suppose that a judicial decision, though involving a violation (or a wrong interpretation) of the law, has not been submitted to the Court of Cassation. In this case, when ordinary appeal is no longer possible, the *Procureur général* can still enter an appeal to the Court of Cassation ; if the judgment is quashed, the quashing has no effect between the parties, whose relations became fixed so soon as the delay for appeal expired. The quashing has a purely moral, a purely theoretical effect. It is intended to annul an error in point of law and prevent the decision from ever acquiring the force of a precedent. This particular kind of appeal plainly denotes both the importance of a judgment in the interpretation and the development of the law and the eminent rôle of the Court of Cassation in the administration of justice and the control of the elaboration of the law.

Such are the principal characters of French case law. To sum up, we should be inclined to state the fundamental differences between our *jus non scriptum* and the English Common Law as follows : In form, the great difference seems to be that French case law is not recognized officially, that law writers only admit it as a fact, instead of allowing it an independent place among the sources of the law, while practitioners always hide it under the mask of an interpretation of statutory provisions. In substance the great difference results from the absence of the rule *stare decisis* and its consequences. No French judicial decision is ever properly speaking a precedent; one does not know if to-morrow the solution laid down in a decided case will not be disregarded or reversed. Case law results, therefore, in France, not from an obligatory leading case, but from a whole series of decisions which have followed a particular interpretation of the law. If later on the first decision takes the aspect of a leading case, that happens solely because in the course of time other decisions have accepted the principle which it consecrated. Decided cases in France are never precedents, but illustrations of positive law, so that a doctrine of case law does not result from one particular judgment, but from a long series of concording decisions. That is not an attitude absolutely contrary to the English system, which was not far from such a state of things before the doctrine of the binding force of precedent had been completely and absolutely affirmed. So that we could almost take up again to-day, in order to characterize modern French case law, the well-known dictum of Lord Mansfield, which is no longer quite true for England: "Precedents serve to illustrate principles and to give them a fixed certainty. But the law (*of France*) which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them."[1]

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[1] Loi 27 ventôse an VII, Art. 88.

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[1] *Jones* v. *Randall* (1774), 1 Cowp. 37.

PERPETUITIES IN FRENCH LAW.[1]

[*Contributed by* SIR MAURICE SHELDON AMOS, K.C.]

THE subject of perpetuities has, for various reasons, acquired less importance in France than it has in common-law countries. The principal explanation of this difference appears to lie in the rules relating to *réserve* and to *légitime*, which protect an owner's natural heirs against the alienation by gift or will of more than a fraction, fixed by law, of his estate. These restrictive principles not only make settlements more difficult to establish in practice, but, being derived from pre-revolutionary law, have doubtless contributed to the formation of social habits unfavourable to the spirit of entail. The practice of creating successive life-interests was, however, sufficiently important under the *ancien régime* to call for regulation. An Ordonnance of 1560 limited such settlements, for the future, to two lives; and a subsequent law of 1566 imposed a general and retrospective limit of four lives.

But in spite of its less accentuated importance, the subject, as dealt with in modern French law, is of considerable interest. In expounding it, it is convenient to distinguish between two different but not unrelated topics.[2]

The first is the problem presented by attempts to "tie up" property, in the strict sense; that is to say, to create a state of affairs such that it is impossible for the full ownership to be conveyed; the second is the problem presented by "divided interests." I will take the second subject first.

A. Divided Interests.—Property is subject to divided interests when, for the conveyance of full ownership, the concurrence of two or more persons, having rights or powers in the subject-matter, would be necessary. It is the general policy of the law to prevent this state of things being unduly prolonged. The following are examples.

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[1] Editorial Note: This article will later be included as part of a work to be published by Sir Maurice Amos and Dr. F. P. Walton dealing generally with French law.

[2] In strict logic the subject of what I have called "divided interests" has no connexion with "tying up." However numerous may be the interests among which full ownership is distributed, to however remote a date the right of entry may be postponed, property cannot be said to be "tied up" if there exist living and ascertained persons who, by joining in a conveyance, could give a complete title. Nevertheless both in English and in French law we find a tendency to bring the two topics into connexion. An illustration may be found in the disposition in both countries to see in a conveyance subject to a resolutory condition an arrangement savouring of a "perpetuity" or of a "substitution."

(*a*) Undivided Ownership.—The general rule is that the right to partition cannot be suspended for a longer period than five years in advance (Code Civil, 815).

(*b*) Usufruct cannot be created for a longer duration than a life or lives in being at the time of its creation, or, in the case of a corporation, for thirty years.[1]

(*c*) Emphyteusis is limited to a duration of ninety-nine years.

(*d*) A leasehold interest cannot be created for a longer period than ninety-nine years, or three lives.[2]

(*e*) Conditional Interests.—The conveyance of property subject to a suspensory or to a resolutory condition creates a "divided interest." In either case, in order to convey a clear title before the condition has been realized, the concurrence of both grantor and grantee would be necessary; and this ambiguous state of affairs may be protracted or projected into a remote future. Nevertheless there is no reason in the nature of things why both interests should not be vested in perfectly determinate persons, able to release whatever they have. Speaking generally, there is no objection in French law to property being conveyed, whether *inter vivos* or *mortis causa*, subject to a condition, either suspensory or resolutory. It may be conjectured, however, that the courts would lean towards treating a resolutory condition as having been tacitly waived, if it had for long been allowed to slumber unnoticed, or if breaches had already been condoned. One may instance the case of conditions or covenants attached, in favour of neighbouring purchasers, to conveyances of lots in a building estate. Such covenants might be treated as creating servitudes, and as being liable, as such, to extinction by non-user for thirty years.

B. "Tying Up."—Property is "tied up" when there is in existence no person, or ascertainable group of persons, having the unrestricted power of alienation.[1] There are two principal ways in which this may happen :

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[1] It is perfectly lawful to grant a series of successive usufructs, provided all the beneficiaries are in existence (C.C. 906). It seems certain that the "life or lives in being," to use the English expression, must be those of actual beneficiaries; so that the grant or reservation of a usufruct to A (and by implication to his heirs) for the duration of the longest life of a class of non-beneficiaries would not be valid beyond the life of the first grantee.

[2] This rule is derived, not from the Code, which is silent on the subject, but from a Revolutionary law of December 18–29, 1790.

(i) the whole, or a part, of the total interest in the property may have no present determinate owner ; this is the case of the "future interest" ; and

(ii) the total interest may be vested in a determinate living person, but his power of disposition may be restricted ; this is the case of "restraint on alienation." [2]

Future Interests.—The creation of future interests is governed by two primary rules—and their exceptions. The first is the rule requiring the beneficiary of a grant, whether *inter vivos* or by will, to be in existence at the moment of the execution of the conveyance, or at the death of the testator (C.C. 906) ; and the second is the rule prohibiting "substitutions" (C.C. 896).

(*a*) The grantee of an interest in property must be alive (or at least conceived) when the grant is made. Coupled with the general principle that it is impossible to create real rights which are unknown to the law (such as an estate tail), this rule would by itself be sufficient to prevent the "tying up" of property by the creation of interests which are not to vest in specified persons until a future date. Or rather, this would be so, were it not for three exceptions.

(i) The first exception is that of a grant subject to a limitation by way of *stipulation pour autrui* in favour of a third party who is not yet determinate, or who is not yet in existence ; as where a bishop gave a fund to a town for the endowment of religious education, subject to the stipulation that, should the municipality, at any future date, adopt secular education, the fund should revert to the donor's successor in the bishopric.[3]

This is not the place to pursue the imperfectly settled general question whether the beneficiary of a *stipulation pour autrui* must necessarily be in existence at the time the contract is made ; but in so far as, in a contract relating to the disposition of property, the answer is in the negative, we have an important exception to the rule under consideration, and an indisputable means of creating a future interest of a kind which in England would be subject to the rule against perpetuities.

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[1] "A perpetuity, that is to say, an estate inalienable, though all mankind join in the conveyance" (*Scatterwood* v. *Edge*, 1 Salkeld, 229).

[2] In the present connexion personal incapacity is irrelevant ; the property of a lunatic is not "tied up."

[3] *Evèque de Périgueux* v. *Ville de Périgueux* ; Sirey, 1892. 2. 89. In this case, the condition having been realized, the court preferred the claim of the donor's episcopal successor to that of his personal heirs.

(ii) The second exception to the rule laid down in C.C. 906 is to be found in the law relating to the contract of marriage, which permits property to be settled on the unborn children of the marriage.

(iii) The third exception belongs to the law of *substitutions permises.*

(*b*) Substitutions.—The rule against " substitutions " is stated as follows in C.C. 896. " Substitutions are prohibited. Any disposition whereby the donee, the instituted heir, or the legatee is charged to preserve the *res* and to transmit it to a third party is void, even as regards the grant to the donee, the instituted heir, or the legatee."

To this rule the Code makes two exceptions. (1) It is lawful for A to give or to bequeath property to B (being *any one* of A's children) subject to the obligation to transmit the same to *all* the grantee's children equally (C.C. 1048). And (2) it is lawful for A, provided he dies childless, to give or bequeath property to B (being *any one* of his brothers or sisters), subject to the obligation to transmit the same to *all* the grantee's children equally (C.C. 1049).

It is not improbable that the reader will think that the purport of these rules is to distinguish the cases in which it is permitted, from those in which it is forbidden, for A to give a life-interest or usufruct to B, followed by a remainder, a *nue-propriété,* to C. This, however, is not the case. The kind of disposition prohibited in general by C.C. 896 and permitted exceptionally by C.C. 1048 and C.C. 1049 is not the gift of a usufruct followed by a " *nue-propriété.*" This is always lawful, provided that both grantees are in existence when the grant comes into effect. What the law forbids—save in the excepted cases—is the grant of the ownership to B, " *à charge de conserver et de rendre* " the said ownership to C.

It may well seem, at first sight, that the Code is here forbidding, as a rule, and permitting, as an exception, something which in either case is logically impossible. In what sense, it may be asked, can B be given the ownership—how can he take more than a life-interest—when there is a gift over of the remainder after his death ? The answer is, first, that " life-interest " and " remainder " are not terms of art in French law : there is *usufruit,* there is *nue-propriété,* and there is *pleine propriété* ; and if B is entitled to possession, and has more than the *usufruit,* he must, in some sense, have the *pleine propriété.* Now what B takes, in the case of a *substitution* *permise*, is certainly more than an *usufruit.* In the first place, —and it is the most important feature distinguishing his tenure from that of the usufructuary—in the event of the failure of the limitation to C, B's title becomes (retrospectively) absolute: the reversion is not to the donor, but to B's heirs or assigns. In the second place, B, as *grevé de substitution*, has wider latitude in respect of waste than he would have (in the absence of express provision in the grant) if he were a mere usufructuary.

And if B, the *grevé*, is (in a true case of substitution) more than a usufructuary, C, the *appelé*, or remainder man, is in a different position from a *nue-propriétaire.* The chief difference is that he need not, in order to be able to take the benefit of the gift or legacy, have been in existence at the time the grant was executed, or when the testator died; and it is in this fact that the principal difference lies between what can be done by way of *substitution* and what could be done by an ordinary gift of a usufruct to B, followed by a gift of the *nue-propriété* to C.

It would be perfectly lawful for A to leave a usufruct to B, followed by a conditional gift to such of B's children as should be living at A's death and should survive B, followed, in the event of B's dying childless, by a gift of the "*nue-propriété*" to B. The provisions of the Code relating to "substitution," which were primarily directed to annulling powers of disposition which would otherwise exist, in effect extend these powers. A secondary effect of C.C. 896 is to lay a trap for unwary testators, who, having inadvertently used the language of *substitution*, are held to have made a wholly invalid disposition; whereas, better advised, and using the language of C.C. 899 (which expressly authorizes the gift of usufruct to B, and *nue propriété* to C), they might have lawfully made substantially the same settlement. The courts doubtless endeavour, *ut res magis valeat quam pereat*, to place upon testamentary language a construction which shall not offend against C.C. 896. They are, however, sometimes unable to do so, not because the future interest is too remote, but because the prior grant cannot, with the best will in the world, be construed as the gift of a usufruct.

Who is the *appelé's* predecessor in title, or immediate grantor? Does C, the *appelé*, take from B, the *grevé*, or from A, the *constituant*? This question derives its importance from the provisions of the Code which prohibit transactions dealing with the inheritance of living persons. If C derives his eventual right from A, he may lawfully sell his reversion as soon as A is dead.

If, on the other hand, his right is to be deemed to come to him directly from B, the *grevé*, any contract by which, before B's death, C purported to realize his expectations would be void. Although the language of the Code would appear to be conclusive in the latter sense, it has been held in several cases that the *appelé* takes directly from the *constituant*.

The logical analysis of *substitution* is not regarded by French jurists as being free from difficulty. As Professor Plassard has recently said, " it is extremely difficult to give a precise explanation of the mechanism of the *substitution* which is entirely satisfactory from the logical and rational point of view." [1]

According to an analysis which is favoured by the courts, the *grevé* (B) takes the property subject to a resolutory condition, while the *appelé* (C) takes it subject to a suspensive condition. But, asks Professor Plassard, if this construction is correct, where is C's suspended right in the interval (for there may well be an interval) between the death of A (the *constituant*) and the conception of C ? It is instructive to notice that the learned writer is not satisfied, as an English or American commentator would probably be, with the simple fact that the right of the *appelé* is preserved by statute.[2]

Restraints on Alienation.—There is one case in which the Code expressly provides for property to be inalienable : this is the case of property included in the *dot* of spouses married under the *régime dotal*, of which neither the husband nor the wife, nor both together, are competent to dispose during the subsistence of the marriage (C.C. 1554 ff.).

How far is it lawful in general for a donor or a testator to place restrictions upon the alienation of property given or bequeathed ? To answer this question it is first necessary to make a distinction depending upon the sanction attached to the prohibition.

The grantor may either : (*a*) direct that a breach of the prohibition to alienate shall operate as a cause of forfeiture ; or (*b*) he may merely direct, or intend, that any purported alienation shall be void.

In the former case, the prohibition establishes a resolutory condition, and is in all cases lawful.

As regards the second type of case, where the sanction is that any purported disposition shall be void, and that the property shall remain indefeasibly in the donee, the courts have adopted the following general principles: (i) any clause of perpetual inalienability is bad, and will be *reputée non-écrite*, and (ii) a provision for temporary inalienability will be valid, if its duration is to be short, and if it is justified by an *intérêt sérieux*. The following are examples of cases in which it has been held that there is an *intérêt sérieux*, and that the period of inalienability is not unduly long:

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[1] Note to Dalloz, *Périodique*, 1928. 2. 9.

[2] He is, in fact, unwittingly, distressed at the absence of " trustees to preserve the contingent remainder."

Where A left property to B, subject to an obligation to pay an annuity to C for life, and the property was not to be alienated so long as the annuity was payable.

Where a vendor, having reserved a right of repurchase, stipulated that the purchaser should not dispose of the property so long as the vendor's right subsisted.[1]

Where A gave property to a descendant, B, and sought to protect his (A's) legal reversion, in the event of B's dying childless, by prohibiting alienation during B's lifetime.

Inalienability may be imposed, with the same motives as inspire what is sometimes called a "spendthrift trust," until the donee or legatee attains a prescribed age.

It seems safe to say that the lifetime of a living person is the extreme limit of time for which the courts will permit a restraint on alienation to be valid. But even this period is not always sanctioned. It is an unsettled question whether it is permissible to graft upon the gift of a usufruct a prohibition to alienate during the whole life of the donee.[2]

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[1] It is provided by C.C. 1660 that the right of repurchase cannot be stipulated for a longer period than five years.

[2] The Paris Court of Appeal, in different chambers, decided this question in opposite senses at a short interval of time. As MM. Colin and Capitant observe (*Traité de Droit Civil*, 3rd edition, i, 767), "this uncertainty is the more unfortunate in that the Court of Cassation has no power of control in the matter, since the question of the legitimacy of the motive (for the prohibition) and that of the reasonableness of the period prescribed, are alike reserved to the sovereign judgment of the judges of fact."

THE REPORT OF THE NEWFOUNDLAND ROYAL COMMISSION.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Genesis of the Royal Commission.—The precise circumstances in which the Royal Commission on Newfoundland came to be appointed have been explained by the Prime Minister of the Island in a manner which goes far to explain the character of the report.[1] In December 1932 the Newfoundland Government, which had succeeded to a most difficult financial position, which he attributed to the preceding administration, was determined to default on the interest payments on the debt. But this determination was altered through the initiative of the British Government, which, anxious to prevent the default of any Dominion, offered to supply the necessary sums to meet the interest due, and suggested that a Royal Commission should be appointed to make an investigation into the affairs of the country. In fact the sums advanced were shared by the United Kingdom and Canada, each contributing $625,000. In June Mr. Alderdice again was determined to default, as the report of the Royal Commission appointed in February 1933 was not yet forthcoming, but the British Government by a grant of $1,850,000 intervened. Canada by this time had disinterested herself in the situation. The Royal Commission was thus enabled to complete its laborious task and to present in October its striking report. The Commissioners represented the United Kingdom, Canada and Newfoundland, Lord Amulree having the co-operation of Dr. C. A. Magrath and Sir William E. Stavert.

The Characteristics of the Report.—The report has a character rare in the findings of royal commissions. It is unanimous, though the recommendations cover so many difficult issues, that unanimity can only have been achieved by a determination to subordinate other considerations to the necessity for presenting a document which would accomplish the aims of the Commissioners. They have set before them a very difficult task, to make clear to the people of

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[1] Parl. Paper, Cmd. 4480.

Newfoundland the causes of their financial and economic difficulties; to inspire them with belief in the possibility, by following their advice, of overcoming both; to convince them that the short and simple course of default is unwise and certain to bring greater evils in its train; and to persuade the British Government and the House of Commons that it is both possible and desirable to rescue Newfoundland from her plight, and to set her on the way to a greater and more assured prosperity than she has yet known. It is in the light of these convictions that the form and spirit of the report are easy to understand. Its repetitions and insistence on the obvious, its spirit of assurance, and its plain speaking are due to the knowledge that, with a simple people like the great majority of Newfoundlanders, ideas must be enforced rather than simply presented for acceptance on their merits. Its optimism may be difficult to justify on logical grounds, but plainly it would be useless to urge Newfoundland to far-reaching changes and great exertions if mere possibilities of improvement were indicated. Moreover, the Commissioners have been extremely guarded in the form of condemnation of governmental action in the past. The historian would have welcomed a detailed account of the complex and unintelligible situations presented by Newfoundland politics since the war. But to have given such an account would have antagonized all the ministers who held office during that period, and have cut off the hope of cordial co-operation. This explains one further obvious omission from the report: the vigour of its denunciation is only equalled by the absence of specific instances of governmental wrongdoing. But it would be very unwise to forget that the report is based on much investigation and careful weighing of evidence, and that its probative character cannot be displaced by facile denials.

The Character of Responsible Government in Newfoundland.—The one criticism which it seems fair to make against the report is that the Commissioners have been led, doubtless by the evidence given to them, to conceive of the deterioration of government in the island as due to practices introduced within the last twenty-five years.[1] They might well have yielded to their own inclination to date the practices much earlier. As a matter of fact the evils of government in Newfoundland are an inheritance from the earliest period of organized government, and they are precisely of the same kind as have prevailed throughout Canada. The Newfoundlanders suffer from no excess of original sin. The federation in Canada has never been free from episodes such as the Pacific Railway scandal which caused Sir J. Macdonald's temporary eclipse, or the customs irregularities which affected so seriously the Government of 1926, or the Beauharnois Canal episode[1] which caused the resignation of a Liberal Senator in 1932. The provinces have far from stainless records, even Ontario having suffered severely from dishonesty on the part of a minister. If Newfoundland has fallen upon days more evil than the federation or any province, there are obvious reasons for the fact. The division of power between the federation and the provinces limits the field of mismanagement of finance, while in Newfoundland one government has full control. There is a far larger population in Canada, which can produce more disinterested and capable legislators than can be expected in Newfoundland, and public opinion is more mature and better informed. Newfoundland is without local government save for St. John's, and in the past the governments in Canada were always seriously affected by financial irregularity until they set up local institutions. Moreover, the Canadian provinces cannot have their securities given trustee rank on the British market, and this drastically limits their power of placing loans cheaply. If the matter is examined in the light of history, it will probably be held that the present unhappy position of Newfoundland is simply the outcome of factors which have ever been present in her government, which were responsible for the crisis of 1895, and which have become more dangerous since the development of new sources of activity in the island has afforded the basis for expansion of borrowing by successive governments on the faith of confidence in the island's resources. Allowance must also be made for the tendency of lenders in recent years to advance money with singularly little care, and the prevailing impression that the credit of the British Dominions was essentially sound, nor can it be said that the prospectuses of Newfoundland loans have been calculated to excite alarm in lenders. Moreover, when we estimate the extent of Newfoundland's failure, we must remember that the Commonwealth of Australia and the Dominion of New Zealand, despite their enormous resources, have found it necessary to break their contracts with the lenders of internal debt and to reduce drastically the interest payable. But in any case it would be an error to look back to the regime[2] of Sir R. Bond as a golden age, or to ascribe to ministries since then any substantially lower standard of political conduct than was exhibited by their predecessors.

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[1] Report, s. 218, p. 81.

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[1] *Canadian Annual Review*, 1932, pp. 80–3.

[2] Report, s. 105, p. 37.

The Spoils System.—It may well be that " for a number of years there has been a continuing process of greed, graft and corruption which has left few classes of the community untouched by its insidious influences,"[1] and that " the present generation of Newfoundlanders have never known enlightened government." But the system is rooted in the past, and it would be very difficult to find any period when the Newfoundlanders knew enlightened government of the type envisaged by the Commissioners. Wise husbanding and development of national resources by a prudent use of public moneys, with the elimination of waste and corruption, are matters which few if any Dominion, provincial or State governments ever achieve. In the period prior to responsible government, which was conceded in 1855, no one could accuse the British Government of having endeavoured to supply enlightened administration whether to Newfoundland or any Canadian colony. Whether the struggle between the politicians and the Government was carried on in Upper or Lower Canada, New Brunswick, Nova Scotia, Prince Edward Island or Newfoundland, the tale is the same. The executive councillors managed the colonial resources with a strict eye to their own interests, and the essential aim of men like Joseph Howe[2] was to secure for the elected representatives of the people control over appointments, the distribution of grants to localities, and the execution of public works with the profits thereunto appertaining. Clearly no imperial interest dictated the retention of control in these matters, and Newfoundland in 1855 was given a free hand. Hence throughout the history of the colony ministries have existed to meet the needs of their constituents, members in the absence of local institutions have served as universal providers, elections have been fought on the basis of competitive promises of benefits, and every government has been under the most pressing obligation to use the public funds so as to reward the assiduity of its supporters and to encourage them to look forward to further favours. Small wonder if men of high character and sensitive honour have been unwilling to enter political life, and if ministers have been inevitably men with a practical interest in the direction of the operations of the departments which are under their control. It would be too much to ask of a Minister of Fisheries, who himself is identified with some branch of that industry, that he should sit down and plan out a scheme of development which his constituents would regard as fantastic. Ministers cannot rise much above the level of the electorate; after all the history of the railway systems of Canada [1] is full of evidence of surrender to political considerations of the dictates of enlightened construction and control.

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[1] Report, ss. 218, 219, pp. 81, 82.

[2] J. A. Chisholm, *The Speeches and Public Letters of Joseph Howe* (1909).

The Civil Service.—Unquestionably the spoils system is disastrous to the civil service,[2] and it prevails unchecked in Newfoundland. Even in Canada it was not until 1908 that its worst evils were faced in respect of the internal service, and despite the Act of 1918 much yet remains unsatisfactory there. Even the administrative officers at St. John's have no security of tenure; on a change of government post-election changes are often of a sweeping character, affecting post and customs officers, railway employees, fishery and timber inspectors and wardens, members of the fire control staff, lighthouse keepers, and even stipendiary magistrates. It can easily be imagined how impossible it is in these conditions to build up an effective upper grade, capable of advising ministers and taking responsibility for everyday administration. Ministers interfere in every detail, and the delicate duties of timber and game preservation are difficult to execute satisfactorily, for an over-zealous official may find his services dispensed with. The pension system, which permits retirement only at age 65 but allows a pension after ten years' service, affords, in the absence of strict limitation of age of candidates on entry, the possibility of the appointment on political grounds of men long past the time when they could be effectively moulded into efficient officers. As usual also, the pay of the service is very low.

Denominationalism.—A factor of a peculiar kind, which operates gravely to the disadvantage of efficiency, is the religious truce concluded after the disgraceful rioting of 1861.[3] The denominations, essentially the Roman Catholics, Church of England and adherents of the new United Church of Canada, live in peace under a system which requires that the interests of all three groups should be treated as far as possible on the footing of equality. The Cabinet is normally fixed at twelve members, to facilitate this plan, and each minister is expected as a matter of propriety to consider the interests of his co-religionists. Moreover, even in the allocation of contracts, a most important feature of island government, the principle has been observed that a rough equality of allocation between the denominations should be observed. It is certainly worth paying something to avoid religious strife, but we may readily agree with the Commission that the price has been too great, and that " the denominational divisions, of which the people are daily reminded, so far from exercising a beneficent influence in the direction of cleaner politics, have failed to check, if indeed they have not contributed to, the general demoralization."

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[1] Cf. the plight of the Canadian National Railways, *Canadian Annual Review*, 1932, pp. 74–6, 542–5.

[2] Report, ss. 229–31, pp. 87, 88; ss. 566–75, pp. 202–5.

[3] Report, s. 60, p. 14; ss. 233, 234, pp. 88, 89.

Economic Effects of the Governmental System.—It is obvious that governments standing in such relations as those described to their constituents could not be expected to accomplish much that was constructive and demanded long-sighted planning. Hence all that has been vitally new in Newfoundland economics has been the result of enterprise largely financed from without, which has asked for large concessions from the government of the day, and received promises and often performance of excessive rewards. It is well known in colonial history that Mr. Chamberlain[1] took the view, in the case of the proposed sale of the railway and the grant of very important franchises to the Reid interests, that the British Government could not interfere, merely because of the possibility that the security of loans subscribed for by British subjects might be affected by the action of the Government. Though Mr. Bond later made better terms,[2] the colony thus deprived herself of very important resources, and, when in 1923 she recovered the railway, it was a rather *damnosa hereditas* which forms a considerable burden on the resources of the country, and has struck a serious blow to the sea trade formerly carried on in small schooners. Similarly, the valuable enterprises in the development of the timber resources of the island for the purposes of newsprint which have produced the townships of Grand Falls and Corner Brook are due to the Anglo-Newfoundland Development Co. and to the International Power and Paper Co. of Newfoundland. They have, however, obtained in ownership or lease 15,000 square miles of timber land, or two-fifths of the total area, and the Government has guaranteed £2,000,000 worth of stock of the latter company. The iron mine at Bell Island is worked by the Dominion Steel and Coal Corporation, and the zinc, lead, copper, silver and gold of the mine at Buchans are worked by the Buchans Mining Co., formed in 1927, under agreement with a subsidiary of the Anglo-Newfoundland Co. These enterprises have afforded employment to large numbers of Newfoundlanders, but they present the Government with fresh problems. The rate of increase of the population is always high and the growth of population at Grand Falls will outstrip the possibility of employment; the assets exploited are wasting assets, and the new occupations are diverting the minds of the people from the still unexhausted and perhaps unexhaustible products of the sea which traditionally are the essential element in the life of the island. Short-time working at the mills or in the mines presents the Government with the problem of what to do with men who have nothing to fall back upon, as they have parted with the necessary equipment for fishing and have lost their skill, or have never acquired it. The Government, it must be owned, has not risen to the occasion. It has failed to conserve its forests by imposing reafforestation on the companies; it neglects this obvious duty even as regards the three-miles area round the coast reserved for the needs of the fishermen. It has disregarded the interests of the fisheries, and has allowed the fishery on the Banks to dwindle to relatively negligible proportions, despite its prime importance for the national life; it has allowed the fishermen to neglect the important fall fishery, which has been gravely diminished in value by the restriction of the bait used to squid, instead of developing the use of herring. It has done little or nothing to secure the proper preparation and marketing of cod; it has failed to discourage the keeping of dogs in lieu of the far more useful sheep and goats, and it has not promoted the development of agriculture as a means of adding to the comfort and employment of the people. Worst of all, perhaps, the funds, which were received from the mills and mines, and moneys raised by loans, have been freely used to relieve distress in a manner involving the maximum of waste and the minimum of profit. One can hardly blame the people if they prefer to receive doles rather than face the dangers of the fisheries, especially in the case of those who have never been trained in youth in sea-craft. In any case, however, it is clear that a prolongation of such action will have disastrous effects on the national morale. Still less, of course, has any administration attempted to grapple with the fundamental defect of the economic fabric, the system of credit[1] under which the fishermen have from the earliest time borrowed from the merchants the necessary supplies for the fishery, at prices fixed by the latter, and sold their catch to them in like conditions, with the result that many of them are perpetually in debt. Prowse[1] saw the errors of the system clearly, but his hope that the *débâcle* of 1895 to which it led would result in its destruction proved wholly unfulfilled.

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[1] Parl. Paper, C. 8867; Keith, *Responsible Government in the Dominions*, ii, 1037–47.

[2] Report, ss. 101–4, pp. 35–7.

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[1] Report, ss. 213–16, pp. 79, 80; ss. 270–80, pp. 102–6.

The Financial Problem.—While the fisheries remained the essential source of the wealth of Newfoundland, and when the memory of 1895 was fresh in men's minds, it was not possible for Newfoundland recklessly to incur debt. Up to 1920, including 13 million dollars of war expenditure, the total debt amounted to 43 millions only, but thereafter reckless lenders and borrowers raised the total to 101 millions, the interest on which amounts to half the revenue. It is impossible to find any excuses for the loans after 1928, by which time it was becoming known in government circles in the colony that insolvency was approaching. The financial houses which provided loans in 1928, 1929 and 1930 must have learned the facts if they had cared to investigate, and it is amazing that it was seriously proposed by the Government to raise an even larger loan in 1931;[2] the failure of tenders for it proved the necessary impetus to the ultimate overthrow of the ministry. The situation, however, has gone far beyond the power of any government to remedy by economies. The realized deficit[3] for 1931–2 was on ordinary account $4,029,339, while $1,275,892 were charged to capital account, and a deficit of $339,000 on railway expenses was left uncovered. Efforts to reduce expenditure have since been made, and Newfoundland from 1931 has enjoyed skilled financial advice, and something like British Treasury control is exercised by the Deputy Minister of Finance and Controller of the Treasury with extensive powers,[4] the British Treasury having seconded officers for the latter post. But the bad financial returns year after year since 1930 of the fisheries have resulted in a great fall of receipts and in large expenditure for relief, so that for 1932–3 the deficit reached $3,253,776. The Commission places the anticipated deficit for 1933–4 at $3,281,551, as a result of the partial failure of the fishery, which reduces the return from customs and increases the expenditure on relief. What is worse, they reckon as matters stand on a current deficit of 3 million dollars, or nearly 40 per cent. of the revenue, in the future. Nor can they find any new taxation to increase revenue.

[1] *History of Newfoundland* (2nd ed.), p. 453.

[2] Report, ss. 139, 140, pp. 51, 52.

[3] Report, s. 149, p. 55.

[4] See the Treasury Control Act, April 30, 1932 (Report, pp. 256–8).

Indeed the customs tariff is too high, and under the Ottawa agreement of 1932 decreases in the interests of British trade and of the requirements of Newfoundland consumers have already been arranged. A tax on unoccupied lands may yield some revenue when it is imposed, and Labrador in the future may prove a source of revenue. But all this is distant and speculative. Expenditure can with difficulty be reduced; the rates of pay of the services have been drastically reduced and in some cases should rather be increased; education has suffered losses which must be made good if the island is to progress. Relief has had to be given out of the fishery season to as many as a quarter of the population; it is accorded at a very low rate, and its reduction is impracticable, nor is there any prospect of recovery, unless energetic means to improve economic conditions are resorted to. Some aid may be obtained by scrapping the branch railways, but the main line cannot wisely thus be treated. There is, therefore, no alternative but in some way to reduce the intolerable burden of interest payments.

Default and Other Possible Remedies.—The Commission is strongly opposed to default on the interest payments as a remedy, however much care might be taken to minimize the character and amount of the default.[1] It would involve inevitably default on repayment of 6 million dollars due in New York in 1936 and £320,000 due in London in 1938. It would shatter confidence within and without the island, injure trade, hamper the importation of necessaries, and retard development, banishing hope of higher wages and improved social conditions. Nor would the effect be confined to Newfoundland alone; the British Commonwealth would suffer. These arguments, of course, are speculative, but in the absence of precedent they cannot rest on any other basis, and it may be agreed that, as default would be due in large measure to mismanagement, not to mere misfortune, the default would be marked by a distinct measure of discredit. The argument that reckless lenders should be discouraged, and that Newfoundland would profit by being precluded from rash borrowing, is one unworthy of a Dominion or colony. A modified form of default has been suggested in the shape of depreciation of the currency, and payment of bondholders therein; it is defended by the argument that Norway and Iceland, the island's chief competitors, have depreciated currencies, but the contention seems to have minimum merit. It is another question whether the currency should not be placed on the basis of sterling as opposed to the Canadian dollar, but that is a matter for later decision and does not really touch the issue.

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[1] Report, ss. 506–13, pp. 178–80.

Labrador.—A solution of the impasse was attempted in 1932 when the Newfoundland Government seems to have been willing to sell Labrador, whose limits were decided in favour of the Dominion's claims as against Canada by the Privy Council in 1927.[1] The price then suggested [2] was assumption by Canada of the island's debt, put at 87 million dollars, payment of 13 millions at once and later of an extra 10 millions. But this offer was inevitably declined, for, whatever may be the value of the forests, the probable mineral deposits and the water power of Labrador, Canada herself has too many difficulties to face to spend money recklessly. Other suggestions [3] for the disposal of the territory include asking the United Kingdom to administer, or entrusting it to a chartered company, but neither suggestion promises any pecuniary advantages, and it seems clear that Newfoundland will have to hold and administer as economically as possible the territory for the present, though, later, development may become possible and profitable.

Union with Canada.—The most obvious solution of the difficulties would lie in union with the Canadian federation, as projected in 1864 and as contemplated by the British North America Act, 1867. But the project was destroyed at the Newfoundland election of 1869 when anti-confederation propaganda carried the day, and Canada threw away the unique chance offered by the Newfoundland *débâcle* of 1895.[4] It must be remembered that the Government of Sir M. Bowell was then feeble, and that, had Sir C. Tupper alone been concerned, the difficulties might have been overcome. As it was, Canada argued that the cost of its offer to accept federation would be $657,000 a year, ignoring the fact that its merchants would profit by a very large increase of trade, and refused to meet the burden of accepting responsibility for the remaining $5,479,000 of Newfoundland debt, limiting the amount to be taken over to $10,350,000. The British Government naturally declined to find the amount. The question of federation has since repeatedly been discussed, and an interesting history might be compiled of the curious intrigues entered into in order to bring about the result. But it has never been carried to a definite issue, and the objections of the people are clear and strong.[1] The storekeepers fear the rivalry of Canadian firms, the farmers the competition of Canadian hay and vegetables, the manufacturers that of Canadian products. Newfoundland, it is argued, is far from Ottawa ; its representation in the Canadian Parliament would be negligible ; Canada has never been heedful of Newfoundland interests, as when in 1890–2 she blocked the island's efforts to conclude a favourable treaty with the United States. Moreover, the fate of the maritime provinces is appealed to as proof of the disadvantages of federation ; they have declined relatively in population, lost power in Parliament, their manufacturers have been gravely injured by those of Ontario and Quebec. Newfoundland's exports have no hope in the Canadian market and must look elsewhere in any event. No doubt there are other forces, making for union. Canadian banks have taken over the banking business since 1895, education is freely sought in Canada, Canadian capital is invested in the Bell Island iron mine and the Corner Brook mill, Canada sends 50 per cent. of the island's imports, and the Methodists of Newfoundland have joined the United Church of Canada. But fear of subordination and of direct taxation, which in Newfoundland is not paid by the average citizen, precludes union at present, and Canada for her part has no motive either to assume a serious financial burden or to agree to any less form of co-operation than federation, even if such a form might meet the wishes of Newfoundland.

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[1] *Labrador Boundary, In re,* 43 T.L.R. 289.

[2] *Canadian Annual Review,* 1932, p. 74.

[3] Report, ss. 519–29, pp. 182–6.

[4] *Ibid.*, App. E, pp. 243–5.

British Assistance.—The only plan, therefore, possible is aid from the British tax-payers, and that involves inevitably a measure of British control, as was made clear during the crisis of 1895, but then rejected. Why should the much-burdened British tax-payer render aid ? The answer cannot be wholly satisfactory, but there are considerations which suggest that aid is defensible. It is undesirable that any part of the Commonwealth should default, though this can easily be much exaggerated. It is true that no less than £2,014,000 of trustee stock exists,[2] and that, while the British Government is in no wise responsible for it, still admission to trustee rank is an act of the British Government, and British investors have acted on the faith of their confidence in such stock as a result of its admission. Further, it may be conceded that Newfoundland development was for a long time retarded by the burden of French and United States treaty rights, but on the other hand there was nothing in this to justify the present difficulties. More legitimate is the impressive record of the Newfoundlanders' services in the war and their great sacrifice at Beaumont-Hamel, when of a regiment which went into action 753 strong only 68 answered the roll call next day.[1] Newfoundland in population and feeling is intensely British; it had the status of a Dominion rather thrust upon it than demanded by it, as the Prime Minister made clear in 1926,[2] and, if the British tax-payer, by a moderate sacrifice, can give the island the chance of regeneration and the prospect of future prosperity, he will doubtless acquiesce even in this new burden.

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[1] Report, ss. 530–43, pp. 186–91.

[2] *Ibid.*, s. 187, p. 70. The loans were raised mainly between 1900 and 1914.

The Financial Scheme.—The plan as adopted by the British Government[3] is to secure from Parliament the guarantee of a 3 per cent. loan for a period of ten to thirty years to be offered in exchange for the outstanding stock and bonds of the Newfoundland Government. Holders of these stocks would thus have a security approximating in market value to the face value of their securities and ultimately repayable in full. Holders of trustee securities may but need not convert; if they do not do so, they will receive the interest and capital on their loans as provided in the terms thereof. The British Government will meet as a free gift for three years any amount which the Newfoundland Government cannot find for the payment of interest on the trustee securities and the new guaranteed loan, and thereafter advance the necessary sums. Any holders of loans who do not convert will receive no payment of interest or principal, so long as any sums are due to the British exchequer on account of such advances. The net result is expected to be the saving of £350,000 a year to the island. No doubt the holders of other than trustee securities will stand to lose something, but that state of affairs is surely preferable to the default else inevitable. Indeed the British offer may be criticized as affording undeserved profits to those purchasers of Newfoundland stock who bought at the lower prices prevailing on the British market for several of the stocks.

The New Constitutional Proposals.—British control[4] necessary to justify the grants and guarantee is to take the form of the handing over of the powers of legislation and government by the Executive Council and the Parliament to the Governor, aided by a Commission of six members, three of whom will be Newfoundlanders chosen by

[1] Report, s. 114, p. 41.

[2] See *Journ. Comp. Leg.*, Third Series, vol. ix, pt. iv, p. 241.

[3] Announcement of November 22, 1933; Newfoundland Act, 1933.

[4] Report, s. 558, pp. 197–9.

the British Government but paid by Newfoundland, three from the United Kingdom which will bear the burden of their salaries. The Commission will act in executive matters as a collective body advising the Governor, but he will have the right to override their views if he sees fit, subject, of course, to the control of the Secretary of State for the Dominions. The three United Kingdom members will control (1) the Department of Finance, including finance, customs, income-tax and the post office; (2) the Department of Natural Resources, including marine and fisheries, forests, agriculture and mines; and (3) the Department of Public Utilities, including public works, railways, steamship and other communications and the Newfoundland Hotel. The Newfoundland members will thus not be concerned directly with the sources of revenue, control of expenditure, development of the island and public utilities; they will control home affairs, justice, education, public health and welfare, police, labour, liquor control and pensions. Legislation will be carried out by the Governor with the Commission which he will not be able to override; the power to disallow will rest with the King in Council. In the Governor's absence his place will as now be taken by the Chief Justice.

Method of Enactment of the New System.—The plan adopted is that of addresses from the legislature followed by Imperial Act.[1] The suspension of the normal government would be removed, it may safely be assumed, by the Imperial Government, if the island recovers its financial stability and desires the restoration of responsible government. The only alternative mode of action would have been by local legislation with a time limit, but there are obvious reasons for preferring imperial action. The loss of status to Newfoundland, of course, is very serious, but can hardly be set against the possibility of the recovery of material prosperity. Newfoundland as a Dominion has always been anomalous; it has been necessarily denied membership of the League of Nations and in foreign affairs has been represented by the British Government, and it may be that, if and when it recovers responsible government, it may prefer not to adopt the style of Dominion. The more appropriate term of Island appears in the Warrant establishing the Royal Commission.[2]

The Civil Service Reforms.—The Governor in Commission will control appointments in future, subject to final control of salary

[1] It has been held unnecessary to obtain, whether by a general election or plebiscite, popular approval of the change of regime, no opposition having been expressed locally. The Statute of Westminster, 1931, has not been adopted by the island.

[2] Report, p. ii.

rates by the Secretary of State.[1] It is intended to insist on educational tests for entrance, promotion by merit, and the establishment of British ideals, including freedom from political and denominational intervention. It is proposed that a body of men should be organized, on lines parallel to those of the Canadian Mounted Police, who would undertake the duty of game wardens, collect customs and revenue in all but the most important ports, act as local representatives of the Government, assist in the post office and railways, and take over generally the functions of local officials other than the magistrates and fishery inspectors. The suggestion [2] is clearly very valuable. It is also desirable to set up municipal institutions as widely as possible, while the existing Boards and Commissions which have sadly mismanaged the affairs in their hands in many cases will be dissolved.[3]

Economic Recommendations.—All this improvement of machinery, of course, will be of little account, if it does not serve to promote effectively the regeneration of the economic conditions of the island. The vital need is to treat the fisheries in their true aspect of Newfoundland's essential asset.[4] The deep-sea fishery and the fall fishery must be revived, adding four months to the present far too brief intensive fishery from June to September. The Commissioner for Fisheries will therefore have to reorganize the present system, with the aid of a Fisheries Advisory Board; Inspectors of Markets must be sent to Oporto and Genoa and perhaps to South America; a Committee will control shipments from the island, and the credit system will gradually be destroyed, first by requiring that in 1934 no merchant shall purchase fish from fishermen without paying a minimum of 20 per cent. in cash. A tax on undeveloped lands is advocated to provide funds for fire control, supervision of timber cutting and replanting waste lands; a forestry officer must be appointed to advise as to control and reafforestation; the keeping of live stock should be promoted; a jam-making industry should be set up to make use of the bounty of nature in this aspect; and the raising of fur-bearing animals should be promoted, as in Canada, for which purpose control by game wardens would be essential. Development of the use of Newfoundland iron ore in the United Kingdom is desirable,[5] and aviation for internal purposes is recommended. Larger grants for education and expert investigation into its improvement are recommended, the provision of public libraries, and of statistical service, and the development of public health activities, especially in the direction of preventive medicine.[1] Of direct imperial interest is the suggestion that, if it is impossible to incur the expense of establishing a branch of the Royal Naval Reserve, at least there should be set up at St. John's a branch of the Volunteer Reserve and one of His Majesty's ships should be stationed in Newfoundland from June to October.[2] The programme of which these are selected items is long and arduous, but, once set on sound lines, it may well be that Newfoundland would show both the desire and the capacity to take over responsibility for carrying it to a successful conclusion, a result which would be most warmly welcomed in the United Kingdom, where there is a generous measure of sympathy for England's oldest colony.

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[1] Report, s. 558 (7), p. 198.

[2] *Ibid.*, s. 619, pp. 218, 219.

[3] *Ibid.*, ss. 586, 587, pp. 208, 209.

[4] *Ibid.*, ss. 347–84, pp. 125–40.

[5] Cf. the notes of August 18, 1932, supplementing the Ottawa Agreement; Report, p. 276.

[1] Report, ss. 588–607, pp. 209–14.

[2] *Ibid.*, ss. 622–4, pp. 219, 220.

MOSLEM LAW IN THE EGYPTIAN MIXED COURTS—WAKF.[1]

[*Contributed by* F. M. GOADBY, ESQ., D.C.L.]

MOSLEM society in its legal aspect presents many points of interest to the European lawyer. Its most striking features are (1) the retention of a permitted polygamy coupled with a but slightly restricted freedom on the part of the man to change his wife at will, (2) a highly complicated system of intestate succession, and (3) Wakf. It is instructive to remark that each of these features is part of what may be termed a family system. The importance of the family in Moslem society can hardly be over-estimated. It is largely responsible for the retention of Moslem courts and Moslem law in so many Oriental countries which have in other matters "received" European law.[2]

Wakf, it is true, is not primarily a family institution, but it is as an institution which enables a settler to immobilize family property that its true importance must be gauged to-day. It is not my purpose here to consider how the rules of Wakf have been made to serve family interests. It is enough to say that throughout the near East the institution of Wakf is of much greater importance as a form of family endowment than as a form of religious or charitable trust.[3] Nor can it be part of my purpose either to define Wakf or to consider its social results. It is enough to say that it is a form of immobilization of property whereby the *corpus* is appropriated primarily to religious or charitable purpose, the revenue being used *in perpetuum* for the purpose indicated in the document of appropriation. As to the social results, a serious view is taken by many. Some years since an Egyptian writer calculated that one-third of the town of Cairo, three-quarters of Alexandria and more than 250,000 feddans in Egypt generally were Wakf. He foretold a possible future in which all Egypt would be Wakf, and remarks: "*Cela equivaudra ni plus ni moins, à la suppression totale de l'Egypte du monde de l'activité ; ça sera sa transformation en une colonie de paresse, en une vallée de désolation et de ruines.*" Both the present and the future are here depicted with a certain exaggeration. But the institution of Wakf undoubtedly has its dangers, and suggestions for the limitations of the evil have been made.

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[1] See also previous article on this subject in *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, pp. 222 ff.

[2] One may compare the former preoccupation of English Common Law and Equity with the family interests of the landed gentry and moneyed classes of this country.

[3] A recent writer remarks: "*De nos jours, en somme, le but pieux proposé par le Prophète est le dernier et le plus tenu des soucis du constituant d'un Wakf. La jurisprudence a dû maintes fois intervenir pour rappeller que l'intention charitable est de l'essence de l'institution. . . . En fait, le Wakf moderne ne s'inspire plus aujourd'hui que d'un double but : détourner un héritage des dispositions souvent injustes de la loi ; sauver la fortune de la prodigalité des enfants.*"

The "jurisprudence" of the Mixed courts of Egypt on the subject of Wakf is extensive. Wakf belongs to the "real" and not to the "personal" statute.[1] Consequently the rule which requires the reference of questions of personal status to the courts of the Personal Statute does not apply,[2] and the Mixed courts claim and exercise a wide jurisdiction subject of course to the provisions delimiting mixed jurisdiction in the Mixed Statute of Organization.[3]

We may refer in the first place to a question of perhaps greater academic than practical interest which has from time to time engaged the attention of the Mixed courts. Moslem law cannot be said ever to have evolved a satisfactory theory as to the juridical nature of a Wakf. French writers generally and the Mixed courts under their influence usually speak of the Wakf as a juridical person, but the use of this legal conception to describe a Moslem institution can be justified only on the ground of convenience. In a case before the Mixed Court of Appeal in 1925 an attempt was made to assimilate the position of the Nazir (administrator) of the Wakf to that of a servant of a juridical person. The court (Mr. Vaux, President) rejected the suggestion. A juridical person, it was laid down, can only be created by a law, and no law in Egypt has recognized the juridical personality of the Wakf. Indeed, according to the unanimous opinion of those learned in the Moslem law, the institution of juridical personality is unknown to it. By that law a Wakf is assimilated to a minor, whose interests are managed by a "guardian" of a special kind, namely the Nazir.[1]

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[1] *Bacos* v. *Asile des Vieillards*. *Gaz. Trib. Mixtes* III, No. 425. Cf. XXIII, No. 375.

[2] Mixed Civil Code, Art. 4. Compare *per curiam* in *Gaz. Trib.* XVIII, No. 113.

[3] See Arts. 9 and 12 of Title I of the Mixed Statute. Wakf jurisdiction in the Native courts is slightly more limited. See Art. 16 of the Native Statute of Organization.

The learning and ability of the President in this case vouches for the accuracy of the statement as to the Moslem law given in the judgment. But the attractive ease with which the Wakf can be fitted into the frame of juridical personality has led the Mixed courts frequently to describe it as such. The analogy is obvious, and analogy is apt to lead to identification. In the same way an English lawyer is apt to speak of a Wakf as a kind of trust. In the absence of any well-developed Moslem theory, one can hardly blame the Mixed lawyers for making use of a conception familiar to themselves. But that there are possible dangers incurred when a Moslem institution is clothed in the garments of European law hardly needs to be said.

Endowed with a personality, the Wakf may not unreasonably demand to be accorded a recognized nationality, and in Egypt, where nationality and religion are of such importance in the determination of jurisdiction, it is certainly desirable for every institution, as for every person, to be able to claim an established nationality if not an established religion.[2]

If, as seems necessary in the existing conditions of Egypt, a quasi-nationality is to be attributed to a Wakf, no one can doubt that a Wakf of Egyptian land must be deemed to be Egyptian, even though the Nazir or all beneficiaries may be foreigners. To say this is no more than to say that an institution which consists in a group or succession of proprietary interests relating to Egyptian land takes its colour from the territory.[3] Viewed as a juridical person, a Wakf of Egyptian land is, therefore, to be deemed an Egyptian national, and this conclusion has been again and again approved by the Mixed courts.[4]

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[1] *Gaz. Trib.* XV, No. 397. But remark that the Mixed courts have more than once asserted that organized groups which have not been incorporated by a law are entitled to sue and be sued as juridical persons. See for example the well-known case of the *Wafd el Masry* reported in *Gaz. Trib.* XVII, No. 399, and compare *Gaz. Trib.* XXII, No. 30. Possibly a distinction is intended to be drawn between an organized group of persons which may be said in some sense to possess a real personality and a body of proprietary rights such as of Wakf, of which the personality must surely be treated as a pure fiction.

[2] A writer in a recent number of the *Gazette des Tribunaux Mixtes* (XXII, p. 99) seems inclined to argue that a Wakf should be treated as definitely Islamic rather than Egyptian.

[3] Compare *Gaz. Trib.* XV, No. 22.

[4] See, for example, *Gaz. Trib.* XIII, No. 47. Cf. XXIII, No. 375.

The Mixed courts will not therefore normally have jurisdiction between a "native" and an Egyptian Wakf.

A more difficult question arises as to whether the famous theory of the Mixed interest ought not to apply in the case of an Egyptian Wakf where some or all of the beneficiaries are foreigners. Must we not in such a case treat the Wakf as of Mixed nationality for purposes of Mixed jurisdiction? According to the theory of the Mixed interest, the competence of the Mixed courts is not to be determined solely by reference to the nationality of the parties in the cause, but also and more especially by reference to the nature of the interests involved in the action. If, for example, foreigners hold shares in an Egyptian company, this creates a Mixed interest and gives to the Mixed courts exclusive jurisdiction. For every judgment against such a company is a judgment involving foreign interests.[1] Much ingenuity may be and has been expended in explaining why the theory of the Mixed interest does not apply to an Egyptian Wakf with foreign beneficiaries. That a distinction between the case of a company and that of a Wakf should be drawn is admitted. That the distinction is drawn on purely legal grounds I doubt. There are strong practical considerations which justify the application of the theory of Mixed interests to companies and which do not apply in the case of Wakf. The Mixed courts have consequently been astute to extend their jurisdiction over bankruptcies and companies; they have drawn back from what might seem the logical extension of the theory to Wakf. No doubt subtle distinctions may be drawn [2] but they are not such as would have stood in the way of courts which recognized a strong practical advantage to be gained by confuting them. Commercial public opinion supported the extension of Mixed jurisdiction over bankruptcy and companies, but public opinion would have more doubtfully supported an extension of such opinion in the case of Wakf.

Rejecting, therefore, the application of the theory of the Mixed interest of Wakf, there remains, nevertheless, a wide sphere in which Wakf jurisdiction is claimed and admitted for the Mixed courts. Subject to the exception provided by Art. 12 of Title I of the *Règlement d'Organisation Judiciaire* which forbids the Mixed courts to hear petitory actions by foreigners against a Wakf (*Etablissements Pieux*), Mixed jurisdiction is left unlimited whenever one of the parties is a foreigner. The Mixed courts entertain actions by beneficiaries for payment of their shares in the Wakf,[1] claims against a Wakf based on contract or tort,[2] revendications brought against a foreigner by a Wakf, possessory claims whether at the suit of a foreigner or of the Wakf. They are not prohibited as are the Native courts from entering into questions as to the validity of the constitution of a Wakf.[3] They can appoint a judicial sequestrator of a Wakf at the instance of the beneficiaries or creditors if the administration by the Nazir *donne lieu à des critiques sérieuses.*[4] That the Mixed courts can set aside a Wakf established in fraud of creditors is expressly stated.[5]

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[1] For a discussion of the nature of a Mixed interest see Scott, *Law affecting Foreigners in Egypt*, pp. 226 ff.

[2] Cf. *Gaz. Trib.* XIX, No. 268, and an article by Fouad Bey Hosny in *Gaz. Trib.* XXII, at p. 101, and cases there cited.

Questions of Moslem law are not involved in the determination of all of these suits, but such questions not infrequently arise. I propose here to consider a few groups of cases which illustrate this.

As already remarked, the nature of the institution of Wakf considered as a legal institution is by no means clear, and the same may be said as to its structural parts. Take, for example, the legal nature of the interest of the beneficiary. The Mixed Code speaks of the beneficiary as a usufructuary.[6] But this is surely a false analogy. It is scarcely arguable that the beneficiary's interest is analogous to the "real" right of usufruct.[7] If we are bound to state the beneficiary's interest in European legal terms, we must speak of it as a right *in personam* against the Nazir rather than as a right *in rem.* The beneficiary has merely a right to receive from the Nazir his share of the revenue arising from the Wakf property.[8] Such we are told is the dominant opinion of Moslem jurists: "*En matière générale, la loi charei pose à cet égard la règle catégorique suivant, 'Que les bénéficiares n'ont aucun droit sur les revenus tant que ces revenus n'existant pas ou ne sont pas encore échus. Leur droit naîtra dès que ses revenus auront existé ou seront échus.'*"[9]

It follows that a beneficiary has an action only against the Nazir and none against third parties who have legal relations with the

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[1] Cf. *Gaz. Trib.* III, No. 425.

[2] Cf. *Gaz. Trib.* XV, No. 397.

[3] This has been denied, *Gaz. Trib.* XIII, No. 126, but there is no explicit provision, such as exists in the case of the Native courts. See *per curiam* in *Gaz. Trib.* III, No. 425.

[4] Cf. *Gaz. Trib.* XVIII, No. 119.

[5] Mixed Civil Code, Art. 76. Cf. *Gaz. Trib.* XIX, Nos. 263, 264.

[6] *Ibid.*, Arts. 22, 77.

[7] See for discussion *Gaz. Trib.* XXII, at p. 103.

[8] The analogy of the English cestui qui trust seems more appropriate, though the juridical nature of the interest of the cestui qui trust is somewhat obscure. See *Baker* v. *Archer Shee*, [1927] A.C. 844.

[9] Kadry Pasha, *Du Wakf*, Art. 400.

Wakf. The Nazir alone can sue third parties or attack a person who has usurped the Wakf.[1] One may indeed go farther. If there has been a change of Nazirs, the unpaid beneficiary has an action against the former Nazir alone in respect of arrears which accumulated during his period of administration.[2] This latter conclusion is perhaps hardly consistent with the alleged juridical personality of the Wakf, but, as already remarked, the Wakf is not a juridical person in Moslem law, though the Mixed courts often speak of it as such. In the case already cited in which the second chamber of the Mixed Court of Appeal expressly denied the juridical personality of the Wakf[3] the question at issue concerned the responsibility of the Wakf and of a former Nazir for a payment made to an assignor after a notification of an assignment had been lodged with the Nazir: The Wakf was held not to be responsible, but personal responsibility was held to have been incurred on the part of the Nazirs in office at the date of notification, on the ground that they had failed to communicate to the succeeding Nazir (Ministry of Wakf).[4]

"The rules of Moslem law relative to Wakf have been consistently applied by the Mixed courts as bound up in the institution itself, an institution fundamentally Moslem." This dictum was applied by the Mixed courts to justify rescission of a lease on the ground of lesion, a remedy unknown to Mixed law, but recognized by the Moslem law.[5] A Nazir who had himself been the settlor of the Wakf and was during his life sole beneficiary was granted a lease which, as was alleged, was voidable for lesion, the rent not amounting to four-fifths of the letting value of similar property.[6] It does not appear for what period the lease had been granted, or whether the consent of the Cadi had been obtained. Possibly the Wakfieh contained powers of leasing beyond the customary period of three years. But even though the consent of the Cadi be obtained, the infringement of the rule that a proper rent must be observed makes the lease voidable for lesion.[7]

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[1] *Gaz. Trib.* XVIII, No. 111, following Kadry Pasha, *Du Wakf*, Arts. 377, 607, 608.

[2] *Ibid.*, No. 114, and cf. *Gaz. Trib.* XV, No. 394.

[3] *Ibid.*, XV, No. 397.

[4] Cf. *Gaz. Trib.* XXI, No. 281. In this case, the question as to the responsibility of the Wakf for the tortious acts of a Nazir committed within the scope of his functions and for the benefit of the Wakf was reserved.

[5] Though the Mixed Civil Code contains certain provisions as to Wakf (*e.g.* Arts. 22, 76, 77), these are of very limited character, and contain no express direction requiring the courts to recognize Moslem law.

[6] *Gaz. Trib.* XVIII, No. 116, Kadry Pasha, *op cit.*, Arts. 278, 279.

[7] *Ibid.*, VIII, No. 132. Cf. XXIII, No. 371.

Reference to the leasing of Wakf property leads naturally to a consideration of the extensive jurisprudence relative to the contracts of Hekr and Gadak,[1] institutions similar to, if not identical with, the Ijaratein of the Ottoman Land Law. Wakf being inalienable, the development of the property is a difficulty. A Wakf often controls little capital, and the device of a long lease for development purposes at a low rent easily suggests itself. So also, if Wakf buildings become ruinous, some inducement must be held out to the lessee to repair at his own cost. Various modifications of the strict law of inalienability have thus arisen, of which the most remarkable is the contract of Hekr. In principle Wakf property cannot be let for a longer period than three years.[2] But, where there's a will there's a way. Convenience dictates and custom allows that a person may be permitted to have possession of Wakf property under an agreement for its development and may thereby obtain a right in perpetuity, subject to the obligation of paying a variable rent or Canon.[3]

The nature of the interest of the Hekerist is obscure. He is usually admitted to have a " real " right, though it has been stated that, in theory, there is merely a lease for one year with perpetual right of renewal. The theoretical difficulties arise no doubt from two circumstances: on the one hand, we have a body of religious law containing legal dogmas but little legal theory ; on the other hand, we seek to fit a recognized institution into the frame of European legal theory elaborated on the basis of a different group of institutions.

That the Hekerist has a true *jus in re aliena* has often been affirmed by the Mixed courts. The Hekerist, it has been said, " acquires the perpetual right of enjoyment and disposition subject to the payment of the Hekr (or Canon) which constitutes an encumbrance on the land given in Hekr recoverable from any person whom the property is transferred on the simple basis of his occupation." [4] It is, in effect, a rent charge.

There is obviously a likeness between Hekr and Emphyteusis, but whether this is more than the accident of circumstances I am not prepared to say.[1] At any rate, a great deal of property, particularly urban property, in Egypt and in Palestine is Wakf held on Hekr or its equivalents. Most of the town of Alexandria is said to be Hekr.

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[1] A basis for the distinction between the two institutions is suggested in *Gaz. Trib.* XVIII, at p. 104.

[2] Kadry Pasha, *op cit.* 276.

[3] " *Prendre en hekr est le contrat par lequel une personne prend en location une terre constituée en Wakf pour y construire, pour y planter des arbres on pour les deux raisons.*" Kadry Pasha, *op cit.*, Art. 331.

[4] *Gaz. Trib.* IV, No. 411.

It is an inevitable consequence that litigation between the Hekerist and the Wakf is frequent. Often the question at issue is one of prescription. A Wakf claims the property as Hekr. A defendant sets up prescription. But another frequent cause of litigation is the determination of the rate of the Canon. "*Les terrains du Wakf ne peuvent pas être donnés en Hekr à un loyer inférieur à celui des terrains semblables. Ce loyer peut augmenter ou diminuer d'après le temps et le lieu.*"[2] Within what limits is the increase allowable ? This very important question has frequently engaged the Mixed courts. Its solution, though no doubt influenced by practical considerations, depends in law upon the view as to the nature of the right of the Hekerist. If the contract of Hekr is to be treated as analogous to Emphyteusis, any serious increases of the Canon seem incompatible with its nature ; if, however, the analogy be that of an ordinary lease, a periodic revision of the Canon would alone bring the interest of the ground lessor into constant relation with the ground value.

The Emphyteutic analogy is the more acceptable to the Mixed courts, only slight increases of the Canon being allowed. The usual practice has been to take into account the relation which the Canon originally fixed bore to the then annual property. There seems to be no justification for this in Moslem law, but its application checks large increases and prevents the Canon from becoming a serious encumbrance upon the right of the Hekerist. Thus in a case before the Mixed Court of Appeal reported *Gaz. Trib.* XV, No. 396, a Canon originally fixed (1854) at £E.1.300 was raised to £E.26 as compared with the sum of £E.543 demanded by the Ministry of Wakfs, the latter sum representing, presumably, the letting value of the property.

It has, however, to be remembered that the criterion by which the Canon in a Hekr contract should be fixed is, according to Moslem law, the comparative value of similar property. On that basis the Wakf would seem entitled to ask for an augmentation much in excess of that usually allowed by the Mixed courts.

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[1] An historical connexion has frequently been suggested. Upon this point see M. Schemeil in *Gaz. Trib.* XV, at p. 238.

[2] Kadry Pasha, *op cit.*, Art. 336.

An attempt made in 1924 on the part of one chamber of the Mixed courts to treat the Hekerist rather as a lessee than as an Emphyteuta[1] was promptly repudiated by another chamber when the first judgment came before it on a *requête civile.* The first judgment had treated the contract of Hekr as *un contrat de location dans lequel le locataire doit payer un loyer égal à celui que l'on paye pour les terrains semblables*, and in so doing, professed, not without authority, to be conforming to the principles of Moslem law. A Canon fixed in 1826 at 7½ p.t. which had been raised in 1908 to £E.22½ was accordingly raised to £E.300, being one-third of the ascertained letting value of the property. On *tierce opposition* by a co-owner, the other Chamber retracted the first judgment and re-established the Canon on the 1908 basis.[2] This also was done in alleged conformity to Moslem law and upon reference to Moslem authorities. The judgment suggests the derivation of Hekr from Emphyteusis and lays down the principle that the Canon is invariable, the true doctrine being retained in the Malakite law. Only with hesitation, we are told, was the possibility of variation admitted in Hanafite law.

Upon the conflicting views as to the true nature of Hekr I do not propose to offer an opinion. I only wish to point out that in the first place the courts seek a solution in Moslem law, and in the second place that the issue is one of first importance for the future of Wakf in Egypt. Could the Wakfs make good a claim to obtain a drastic revision of the Canons fixed under old Hekr contracts, they would secure a valuable share in the benefits arising from the large increase in urban values. If they are to be allowed only nominal increases, the real benefit accrues to the Hekerist. For practical purposes the land ceases to be Wakf since the interest of the Hekerist becomes dominant.[3] The recent decision of the Mixed Court of Appeal in the case of the *Ministry of Wakfs* v. *Rofé & Sons*[4] illustrates in an interesting manner both the nature of Hekr and the extreme difficulty of interpreting the old hodgets (title-deeds). More than one hundred years ago a parcel of Wakf land in the Mousky (Cairo) had been let to a certain Frenchman, the letting being from year to year. The lessee erected certain structures upon the land with the consent of the Wakf, and in Moslem law such erection would be interpreted as giving to the lessee a preferential right of occupation (*Karar*) provided that he be willing to pay a just rent.[1] Subsequent documents appeared to confirm this right of *Karar*, but might, it appeared, also be interpreted as enlarging the right of the lessee so as to give him a perpetual right to the structures and perpetual right to renew them as occasion demanded. The structures having subsequently become ruined or perhaps having entirely disappeared, the Wakf claimed the land, alleging that the lessee's right was one of occupation of the structures, to which the land may be said to have been accessory ;[2] the structures having ceased to exist, the right of the lessee necessarily disappears also. The court, however, interpreted the later documents as creating a right of Hekr for the benefit of the so-called lessee and this right was to be enjoyed in perpetuity irrespective of the existence or non-existence of the structures or plantations.

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[1] *Gaz. Trib.* XV, No. 12.

[2] *Ibid.*, No. 395.

[3] See an article by M. Schemeil in *Gaz. Trib.* XV, at p. 237, in which the writer strongly supports the practical invariability of the Canon.

[4] *Gaz. Trib.* XIX, No. 261.

Another question which has been much discussed, both professionally and judicially, concerns the application to Wakf of the doctrine of Prescription. Wakf land being inalienable, transfer by means of Acquisitive Prescription would seem to be impossible. But there is no provision in the Mixed Civil Code excluding the application of the ordinary rules of Acquisitive Prescription to Wakf.[3] Nor has the Mixed legislator provided any rule special to Wakf. One is therefore led to conclude that Wakf interests in land can be prescribed against on the same terms as other interests, in accordance with the civil law.

On the other hand, it is certain that Moslem law does not recognize Acquisitive Prescription, although a delay of thirty-three years on the part of a Wakf is a good defence in bar of an action to enforce a Wakf interest against the occupier.[4]

Many varying decisions of the Mixed courts have been given upon the question whether it is this rule of limitation or the Acquisitive Prescription of the Civil Law which applies to Wakf property in Egypt. The tendency in recent years has been to recognize that Moslem law alone is applicable. A striking example is furnished by the decision in *Ministry of Wakfs* v. *Heirs of Ismail Hussein* given by the Mixed Court of Appeal (President, M. Baviera), February 26, 1929.[1]

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[1] Kadry Pasha, *op cit.*, Arts. 283 ff. Cf. *Gaz. Trib.* VIII, No. 132. The provisions of 17 & 18 Geo. V, c. 36, s. 5 seem analogous, though it is in respect of the goodwill of business that the *Karar* under that section is to be enjoyed.

[2] The conception of land as accessory to structures or trees is well known in Moslem and Ottoman law.

[3] See for the rules of Prescription Arts. 102 ff. of the Mixed Civil Code, which adopt, with considerable modification, the provisions of the French Civil Code, Arts. 2265 ff.

[4] Kadry Pasha, *op cit.*, Art. 587.

The Ministry of Wakfs sought to revendicate certain land included in a Wakf created in 1898 and which had been subsequently expropriated. Various questions were raised in the appeal, but we may limit our attention to the fate of a portion of the lands with reference to which the defence depended upon the application of the civil in place of the Moslem law. It was contended by the defendants that the Moslem rule was a pure rule of procedure applicable, of course, in Moslem courts but, like other procedural rules, not applicable elsewhere. This being so, the civil rule of Usucapion must be applied in the Mixed courts, seeing that the civil law contained no special provision as to Wakf. It was further argued that the institution of Wakf, not being religious in character and being certainly prejudicial to the economic interests of Egypt, merited no special protection. This latter point was summarily rejected by the court. Whether or not Wakf could strictly be called a religious institution in the sense of being divinely commanded, it at least belonged to the *Statut Religieux* as having its origin in a custom founded on the *Sunna*. And if its economic effects were bad, which the court was far from wholly admitting, it was for the legislator and not the judiciary to find a remedy.[2]

The argument as to the procedural character of the Moslem rule was treated with more respect. The methods of extinction of a right, it was said, form an integral part of the theory of the right in question, and in particular the method of extinction by lapse of time is an inseparable part of the action and consequently of the right itself, as determining, so to speak, its value and vitality. The long period required for the extinction of the right of property in Wakf shows the importance which Moslem law attributes to the institution and is inseparable from it. It cannot be regarded as a mere matter of procedure.[3]

This reasoning is open to objection, but it was cogent enough for the Mixed courts, and an almost simultaneous decision of the Native Court of Appeal assures us that the Egyptian courts are not prepared to treat Wakf as governed in this matter by civil law rules. In the Native case[1] the decision was arrived at *Chambres Réunies* and may, therefore, be deemed to fix the native *jurisprudence.*

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[1] *Gaz. Trib.* XIX, No. 271. The jurisprudence is abundant and the subject has also been discussed in many articles in the legal journals.

[2] In an almost contemporary case before the Cairo Tribunal a more cordial reception was given to arguments based upon the economic disadvantages of Wakf (*Gaz. Trib.* XIX, at p. 275).

[3] It may be objected that prescription in Moslem law is not extinctive of the right at all, a consideration which seems to upset the argument in this judgment. See, however, the judgment of the Native Court of Appeal referred to below.

The court frankly admitted that Wakf property was inalienable and that, consequently, neither acquisitive nor extinctive prescription was possible in Moslem law. Delay for thirty-three years was a bar to claim if the delay had not been due to excusable causes. The court, nevertheless, rejected the objection that the thirty-three years rule, being only a rule of procedure, was applicable in Moslem courts alone. On the contrary it adopted hardily the views upon this point set forth in the judgment of the Mixed Court of Appeal last cited. But the Native court went much farther. It faced frankly the difficulties which must arise from the rigid application of the Moslem rule forbidding the transfer or extinction of Wakf interests by prescription, and adopted an eclectic conclusion. It held that though the Moslem period of thirty-three years must be accepted as necessary to bar a claim in Wakf, yet the effect of the bar on the Wakf rights should be appreciated by reference to the principles of the civil law. The argument is somewhat obscure but the conclusion is clear.

" *Attendu que l'élément constitutif important de la fin de non recevoir est bien la possession apparente de trente-trois ans ; que cet élément est bien la possession aboutissant à la prescription acquisitive du droit civil, et la preuve en incombe au défendeur pour que le procès ne soit pas entendu contre lui ; que dès lors l'exception de non recevoir, prévue au Règlement des Mehkémehs équivaut à celle de rejet au fond pour cause de prescription régulière par la longue durée ; en ce sens que dans l'une et l'autre exception, il faut prouver la possession du défendeur et l'abandon du demandeur ; qu'appliquer donc la règle du droit musulman telle qu'elle est, n'aurait pour résultat que les inconvénients ci-dessus detaillés et dont les conséquences sont incompatibles avec les principes de droit ; que ce fut seulement dans une intention particulière, celle d'éviter de porter atteinte, en légiférant pour les Mehkémehs à une règle fondamentale du droit musulman, que le législature civil a édicté le principe tel qu'il est prévu au Règlement des Mehkémehs ; que, quand il observe cette explication, le juge civil doit concilier les principes qui se heurtent, de façon à ce que se réalise l'objectif du legislateur sans que soient enfreintes les règles de l'equité.*"[2]

The conclusion therefore to which the court arrived was that the lapse of the period of thirty-three years must be deemed to prescribe the right in accordance with the principles of the civil law, and that consequently the possessor must be declared owner of the property.

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[1] See for a report *Gaz. Trib.* XIX, at pp. 277 ff.

[2] *Gaz. Trib.* XIX, at p. 280.

Enough has now been said to illustrate the application of Moslem law by the Mixed courts, though there remain other points not without interest. Egypt, from certain points of view, is of very special interest to the student of comparative law. In the Mixed courts we find a body of judges drawn from many countries and with varied legal training, some of whom are certainly men of marked ability; they are compelled by their position to examine and to apply legal conceptions derived from other systems than those in which they have been trained. The confidence placed by the Egyptian public in the courts indicates that they have been, in general, successful in the difficult task set before them.

THE UNIFICATION OF THE RULES OF CONFLICT RELATING TO NEGOTIABLE INSTRUMENTS.

[*Contributed by* H. C. GUTTERIDGE, ESQ., K.C., LL.D.]

Methods of Settlement.—There are two possible methods for the settlement of conflicts of laws. The first, which has been termed the radical method,[1] consists in such measures of unification as will lead to the disappearance of all divergences. The second, which is less drastic, does not attempt to remove the differences between national laws, but seeks to reduce the resulting inconvenience by bringing into existence a code of the rules of conflict which will have a world-wide application.

It is, no doubt, true that the movement for the unification of the national laws of commercial paper has made considerable progress as the result of the International Conferences held at Geneva in 1930 and 1931.[2] It would be premature to speak with confidence, but there are grounds for the hope that the Uniform Law of 1930 on bills and notes, and the Uniform Law of 1931 on cheques, will ultimately be adopted by the great majority of the twenty-six countries which signed the conventions at Geneva.[3] Such uniformity as may follow will, however, still be regional, because the United States and the British Commonwealth of Nations together with certain of the Latin American Republics have been unable to participate in the movement.[4] It is therefore hardly an exaggeration to say that the majority of the negotiable instruments which now circulate in international commerce will, as heretofore, contain within them the germs of future conflicts of laws. The delegates at Geneva were keenly alive to this aspect of the situation, and an attempt was made to meet it by the drafting of two separate conventions which were intended to unify the rules of private international law in relation to bills and notes (Convention of 1930), and in relation to cheques (Convention of 1931). These were signed by all the nations which adhered to the two conventions on the substantive or material law, and the hope was expressed that the Anglo-American countries might see their way to follow suit, even though they felt compelled to stand aloof from the general scheme of unification.[1]

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[1] M. Asser, Netherlands Delegation to the Geneva Conference on the Law of Bills and Notes, 1930, *Records of the Conference of* 1930, p. 359 (League of Nations Publications, II, Economic and Financial, 1931, II, B.2).

[2] See *The International Unification of Laws concerning Bills of Exchange*, Manley O. Hudson and A. H. Feller, 44 Harv. L.R., p. 333.

[3] At the moment of writing only four countries have given full effect to the two Uniform Laws, *i.e.* Germany, Denmark, Norway and Sweden. The Uniform Law of bills and notes, has been definitely adopted by Austria, Belgium and the Netherlands.

[4] Great Britain and Northern Ireland signed and ratified the Convention of 1931 on Stamp Duties on cheques. A Bill will be presented in due course to Parliament for the purpose of enabling ratification of the parallel Convention of 1930 on Stamp Duties on bills of exchange.

It should, however, be stated unequivocally that there does not appear to be any prospect that this hope will be realized, because it is inconceivable that either the United States or the British Commonwealth could become parties to the conventions in their present form. How far the text of the conventions can furnish a *base de discussion* in the event of future negotiations for the unification of the rules of conflict is another matter, and it is the object of the writer to examine the question from this standpoint more particularly with the view of ascertaining the extent to which the issues between the continental and Anglo-American systems of conflict can, perhaps, be narrowed down. The unification of the substantive or material law of negotiable instruments presents difficulties which must at present be regarded as insuperable,[2] but different considerations would seem to apply to any effort to secure uniformity in the rules of conflict. The door still stands open for any future negotiations,[3] and there are grounds for the belief that the prospect of arriving at an agreement as to the rules of conflict is not so remote that a purely negative attitude on the part of the Anglo-American countries would be justifiable. It is probable that the nations of the Continent of Europe would be willing to make a sacrifice of many of their national predilections if there were reasonable grounds for hoping that the Anglo-American countries were willing to make a serious attempt to secure uniformity. Exchange law has always been viewed on the Continent as a matter which stands apart from the general law of obligations, and the process of unification would, to a large extent, be free from the difficulties which are encountered in any endeavour to deal with conflicts arising out of other contracts such as the contract of sale.[4] It would, of course, be idle to ignore the practical problems which are connected with the multiplicity of jurisdictions owning allegiance to Anglo-American law. On the other hand, it so happens that the demand for unification would coincide with the need for revision of the existing American and English rules of conflict. A process of domestic unification such as is contemplated by the Restatement of the Law in America might perhaps be combined with an attempt to secure uniformity within the Anglo-American circle as a whole, if not throughout the world. The provisions of s. 72 (2) of the English Bills of Exchange Act, 1882, have been more seriously criticized than any other part of that admirable measure. Its language is very ambiguous in certain respects, and it fails to cover the ground as completely as is desirable.[1] We have the authority of Professor Lorenzen for the statement that the American rules of conflict relating to bills and notes are in an "unsatisfactory condition."[2] It is only necessary to refer to his well-known treatise on the subject in order to obtain a picture of the welter of divergent rules which run criss-cross throughout the various legal systems of the world in such a way as to constitute a veritable barricade against international intercourse.[3] The nations are at loggerheads with one another on this question, and it is doubtful whether the two Uniform Laws which were adopted at Geneva will sensibly ameliorate this state of affairs. It must be remembered that international finance is not poised at the moment on any centre which comes within the ambit of those laws, and it is probably correct to say that the centre of gravity of the exchange machinery of the world lies outside them. We stand very much where we did before 1930; indeed in a sense the position has become even more complicated than before, because each of the States signing the conventions will in future be under the regime of two systems of conflict, one of which will be reserved for use when a bill or cheque transaction takes place wholly within the enclave composed of signatory States, whilst the other will be applied where one of the parties to the action is a citizen or subject of a non-signatory state.[4] This is a situation which cannot be contemplated with complacency by any private international lawyer.

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[1] See the Report of M. Diena (Italian delegation), *Records of the Conference of* 1930, at pp. 154, 155.

[2] See the Report of Sir Mackenzie Chalmers to the Economic Committee of the League of Nations (League of Nations Series, C. 487. M. 203. 1923 II. E. 106, at p. 98). See also the statement of the writer as British delegate, *Records of the Conference of* 1930, p. 345.

[3] See the speech of M. Giannini (Italian delegation), *Records of the Conference of* 1930, at p. 457.

[4] The question of the unification of the rules of conflict in regard to the contract of sale is now under consideration by a sub-committee of the Diplomatic Conference at The Hague which has been in session since 1928. No agreement has been reached up to the present. The International Law Association is also at work on this question on parallel lines. See *Les Conflits de Lois en Matière de Vente*, by Judge Algot Bagge (1929.).

It does not appear to be necessary, for present purposes, to make any close study of our problem from a comparative point of view. This has already been done in a masterly way by Professor Lorenzen, and any attempt to follow in his footsteps would, indeed, be an impertinence. Nor is it desirable to envisage it from a doctrinal angle. The need of the moment is not so much for the reconstruction of the existing systems of private international law on a scientific basis as for the formulation of international rules which will meet the requirements of the business community.

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[1] Dicey, *Conflict of Laws* (5th ed.), p. 707; Westlake, *Private International Law* (7th ed.), p. 322; see Falconbridge, *Banking and Bills of Exchange* (4th ed.), ch. 52, where the matter is discussed at length.

[2] Lorenzen, *The Conflict of Laws relating to Bills and Notes*, at p. 5.

[3] An even more detailed and almost bewildering study of the present state of confusion and anarchy will be found in *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht*, Article *Internationales Privat Recht* (*Wechsel und Scheckrecht*) by Veith, vol. iv, p. 489. See also Michaelis, *Wechselrecht* (1932).

[4] As to this see Art. 10 of the Geneva Convention of 1930, on conflicts arising out of bills and notes, which will be discussed hereafter.

Paramount Considerations.—There are, however, certain considerations which seem to be paramount if the attempt to arrive at uniformity is to be reviewed. It is submitted that they can be summarized in the following way:

(*a*) The rules should be as few in number as is reasonably possible. There are certain questions involved which are either lacking in importance from a business point of view, or may be omitted from a uniform system on the ground that they are devoid of an international character.

(*b*) Rules which are at present common to all systems of law should be accepted unless there is a very strong case for their alteration.

(*c*) In case of doubt that rule should be preferred which will function most smoothly in practice, even if it should run counter to established principles of private international law.

(*d*) All other things being equal, preference should be given to a rule which will avoid the necessity of proving foreign law in a territorial court. This is a constant source of embarrassment to judges and of dissatisfaction to litigants. In particular the doctrine of renvoi should be excluded and all the rules laid down by an international code of conflict should be understood as "referring to the ordinary law of a foreign State exclusive of its rules of the conflict of laws."[1]

In the case of negotiable instruments the problems to be solved relate almost entirely to questions of business expediency. It cannot be said that fundamental principles of private international law are at stake when we are dealing with a type of commercial instrument such as the bill of exchange which has always possessed a very distinct individuality of its own, and has moreover always been international in character. The law relating to it was at one time uniform throughout the world, and it owes its origin to men of business, and not to lawyers. If the unification of the law itself must be regarded as impracticable at the present day, surely it is not unreasonable to hope that it may at least be possible to reduce the resulting inconvenience to a minimum by securing uniformity in the rules which will govern conflicts when they arise.

The Geneva Conventions of 1930 and 1931.—The two drafts, relating to bills and notes on the one hand and to cheques on the other, which were laid before the Conferences of 1930 and 1931 were prepared in advance by a Committee of Experts which presented its report to the Council of the League of Nations in 1928.[2] They dealt not only with rules of the conflict of laws, but also with certain provisions for the abolition of stamp duties, which ultimately became the subject-matter of separate conventions. The scheme suggested by the Committee for the solution of questions of conflict was very materially altered at the subsequent Conferences, and it is therefore unnecessary to refer to it in detail. Neither the United States nor Great Britain were represented on this Committee, and certain of its resolutions were only carried by a bare majority.

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[1] See Lorenzen, *op. cit.* p. 176.

[2] For the text of the Report see the League of Nations brown book *Preparatory Documents*, C. 234, M. 83. 1929, II. The drafts will be found in the same volume at pp. 70 and 80 respectively. See also Quassowski, *Die Genfer Abkommen über die Vereinheitlichung des Wechselrechtes*, Zeitschrift für ausländisches Privat Recht (1930), p. 770.

It is somewhat remarkable that much greater difficulty was experienced in securing the adoption of these two draft conventions than in securing unification of the substantive or material law. In fact at one moment in the course of the proceedings at the Conference of 1930 it appeared to be probable that the negotiations would come to an abrupt termination.[1] This episode was of considerable interest as affording an illustration of the fact that the rules of the conflict of laws have acquired an almost aggressively national character in certain jurisdictions, but it was also symptomatic of the general feeling of malaise which permeated the discussions on this subject. This may be explained partly by the fact that certain governments[2] had intimated that they had doubts as to the wisdom of attempting to secure uniformity in the rules of conflict, and partly by the disappointment which was felt at the abstention of the United States and Great Britain. In these circumstances the efforts of a very able and tactful chairman, M. Limburg, were directed towards securing agreement within the somewhat limited time at the disposal of each of the Conferences. It is perhaps a matter for comment that some of the Articles were adopted without debate, whilst others were bitterly contested and only decided by bare majorities, and that the discussions as a whole were very brief. Three days were devoted to the convention on conflicts of laws relating to bills and notes and a like period to the parallel convention which had conflicts of laws arising out of cheques as its subject-matter. These two conventions were, in fact, the fruits of compromise, and an onlooker may perhaps be forgiven if he expresses some doubt as to the permanent value of certain of the conclusions which were arrived at. In their entirety the conventions nevertheless represent a remarkable achievement, having regard to the well-known difficulty of obtaining unanimity on almost any question of a private international law nature. It is possible that they will be adopted by a large number of States, in which event they may play an important part in any attempt which may be made in the future with a view to securing world-wide unification. Whether this will be the case or not depends on the possibility of reconciling certain fundamental differences between the structure of the Anglo-American law of negotiable instruments and that of the Continental Systems. It is probably sufficient to allude to one instance of the difficulties which may arise. A cheque is in Anglo-American law merely a bill of exchange payable at sight and drawn on a banker. It is governed by certain special rules which are necessary because the drawee is a banker, but in most respects it is subject to the law of bills of exchange in general. The Geneva System, on the other hand, divides commercial paper into two separate categories, the one consisting of bills and notes, and the other of cheques, and each of these is governed by a special Uniform Law of conflicts of its own. The same instrument might consequently fall under the one heading or the other, according to the forum which has seisin of the subject-matter of litigation. If the action is brought in England an instrument may be treated as a bill of exchange, but if the matter is fought out in a continental court it may be regarded as a cheque and would, therefore, under the Geneva System be governed, in any event, by a different code of private international law. It is difficult to see how the Anglo-American countries can be parties to the dichotomy which characterizes the Geneva System, and if their co-operation in a future scheme of the unification of the rules of conflict is desired it will be necessary to review the whole basis of the Geneva System on this ground alone. The United States and Great Britain cannot very well be expected to reconstruct their legislation so as to admit of the employment of the dual system of conflict adopted at Geneva. On the other hand, the continental nations would probably be unwilling to submit both bills and cheques to a unitary system of rules of conflict on the Anglo-American model, covering all kinds of commercial paper, because that would in turn call for drastic revision of the Uniform Laws, to which the Anglo-American countries are not parties. We must therefore conclude that the basis of the Geneva System is impossible as a foundation for any future negotiations, though the individual rules of the conventions may perhaps serve as a starting-point for the discussion of details. The only feasible method of overcoming this impasse would seem to be to concentrate on a scheme which would unify the rules of conflicts relating to the two types of instrument in a single convention.

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[1] See the speech of M. Giannini, *Records of the Conference of* 1930, at p. 351.

[2] *E.g.* Hungary and the Netherlands. See *Preparatory Documents*, pp. 90 and 92.

The operative rules of the two Geneva conventions will be considered hereafter,[1] but it may be pointed out that they are limited in number. The Convention of 1930 on conflicts of laws arising out of bills and notes contains twenty articles of which only nine deal with the subject-matter, the remainder being of a formal nature. The parallel Convention of 1931 on conflicts of laws arising out of cheques is composed of nineteen articles of which eight can be regarded as operative rules. Reservations do not appear as such, but they are concealed in one instance by the phraseology which has been employed.[2]

Attention should be directed to a provision appearing in both conventions which seems to be of some importance because it may affect the position of citizens or subjects of non-signatory States.[1] It runs as follows :

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[1] *Post*, p. 59 *passim*.

[2] *I.e.* Art. 3, para. 3 of the Convention of 1930 (bills and notes) and Art. 4, para. 3 of the Convention of 1931 (cheques).

> Each of the High Contracting Parties reserves to itself the right not to apply the principles of private international law contained in the present Convention so far as concerns (1) an obligation undertaken outside the territory of one of the High Contracting Parties, (2) any law which may be applicable in accordance with these principles and which is not a law in force in the territory of any High Contracting Party.

The wording of this Article is somewhat obscure, but its intention was made plain during the discussions at Geneva. It is designed to enable a territorial court to refuse to apply the rules of the conventions, if to do so would place a citizen or subject of a non-signatory State in a more favourable position than he would have been apart from the conventions. In other words, its object is to provide some encouragement—it would be unfair to regard it as a menace—to non-signatory States to become parties to the conventions, though whether it will have that effect may be considered doubtful. It is, however, important in this sense, that it keeps the old rules of conflict in existence for this particular purpose, and it is conceivable that a continental State may thus be possessed of two concurrent systems of the rules of conflict, one of which will only be employed if a party before the territorial court happens to be a citizen or subject of an Anglo-American country. The adoption of this Article is, perhaps, to be regretted, not so much on any ground connected with the comity of nations, but because it introduces a further element of confusion into a position which was already much too complicated.

The Question of Capacity.—From a business point of view this is the least important of the questions which fall to be discussed. Infants, lunatics and married women are not often in the habit of affixing their signatures to bills of exchange, and it can only happen very exceptionally that litigation connected with commercial paper circulating internationally will turn upon the capacity of a defendant to bind himself by his signature.

It is indeed questionable whether the most prudent course would not be to omit any reference to capacity from any future international convention on exchange law[2] and to leave the matter to be dealt with either by the existing national systems of conflict, or by a separate convention which would regulate the question as a whole, and not merely in its relation to the law of negotiable instruments. In any event it is highly desirable that any attempt which is made to deal with it should be directed towards a solution of the problem on its merits, *i.e.* in the interests of international commerce and not from the point of view of safeguarding persons who are treated as incompetent by their national law.[1]

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[1] Art. 10 of the Convention of 1930 and Art. 9 of the Convention of 1931. See the statement by M. Limburg (President), *Records of the Conference of* 1931, League of Nations Series, C. 294. M. 137. 1931. II. B. at p. 371.

[2] The Hague Uniform Law of 1912 was silent on this question, and it is not dealt with either by the Bills of Exchange Act, 1882, or by the American Negotiable Instruments Law.

It is unfortunate that " capacity " should be the most controversial and warmly contested of all the topics which we have to consider. The discussions at the Geneva Conference of 1930 very nearly came to an untimely end on this very point,[2] and it has always occupied an amount of space in legal treatises which, it is submitted, is due rather to the inherent difficulties which surround it than to any intrinsic importance which it possesses from a practical point of view.[3] But if it is regarded as necessary that it should be dealt with it would seem that the proper starting-point for the discussion is undoubtedly Art. 2 of the Geneva Convention of 1930 on conflicts arising out of bills and notes, which represents the only instance in which an agreement has been arrived at, and is also an illustration of the very grave impediments which exist in the way of any international understanding on this extremely delicate and complicated problem.

Art. 2 of the convention runs as follows :

> The capacity of a person to bind himself by a bill of exchange or promissory note shall be determined by his national law. If this national law provides that the law of another country is competent in the matter, this latter law shall be applied.
>
> A person who lacks capacity, according to the law specified in the preceding paragraph, is nevertheless bound, if his signature has been given in any territory in which, according to the law in force there, he would have the requisite capacity.
>
> Each of the High Contracting Parties may refuse to recognize the validity of a contract by means of a bill of exchange or promissory note entered into by one of its nationals which would not be deemed valid in the territory of the other High Contracting Parties otherwise than by means of the application of the preceding paragraph of the present Article.

The relevant Article (Art. 2) of the Convention of 1931 on conflicts of laws arising out of cheque transactions is in identical terms.

The above solution of the problem is one which cannot be regarded as satisfactory from the point of view of the Anglo-American countries. It is true that the combined effect of the first two paragraphs is to grant recognition in practice to the law of the place of the contract, but any reference to nationality in a convention of this nature may cause embarrassment if the *de cujus* is a citizen of the United States or a subject of His Majesty the King. Nor can the allusion to renvoi [1] be regarded with equanimity. It produces a solution which could not be understood except by a trained lawyer.[2] In any event such merits as the first two paragraphs of the article may possess from the point of view of compromise are entirely counteracted by the provisions of the third paragraph, which enables a territorial court to apply its national law to the question of the capacity of a defendant who is one of its nationals even in the case of an obligation contracted by him in a country according to whose laws he would have been capable. This excrescence on the main rule was intended to preserve the *status quo* of French and German law, and is regrettable as it gives preferential treatment to nationals as compared with foreigners and thus introduces an exception which is repugnant to the spirit of an International Convention. The Italian delegation did not submit to this consecration of the ultra-nationalistic point of view without a strong protest.

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[1] See Lorenzen, *op. cit.* at p. 82 ; Beaucé, *Conflits de Lois en Matière de Lettres de Change*, at p. 99 ; Hirsch, *Die Vereinheitlichung der wechselrechtlichen Kollisionsnormen*, Juristische Wochenschrift, 1930, at p. 1338. *Contra*, cf. Chéron, *Annales de Droit Commercial*, 1929, at p. 54.

[2] See the speech of M. Giannini, the leader of the Italian delegation, *Records of the Conference of* 1930, at p. 352.

[3] *E.g.* in Professor Lorenzen's treatise, *supra*, more than one-quarter of Part II, which deals with conflicts, is devoted to this question.

The provisions of Art. 2 were also criticized at Geneva on the ground that they failed to deal with the capacity of corporations as distinct from that of individuals, or with the problems which would arise as regards persons of no nationality or of double nationality. The Conference declined to enter upon a discussion of these highly controversial questions, and we may therefore leave the matter there with the observation that the difficulties which arise in this connexion furnish an additional argument against the choice of nationality as the basis for the determination of capacity.[3] I venture to submit that if capacity is to be dealt with at all in a Uniform Law some other way must be found out of the difficulty. The choice lies between the *lex patriae*, the *lex domicilii* and the *lex loci contractus*. The question, so far as it is of practical importance, is one which affects the security and certainty of exchange transactions and should therefore be decided from a wider point of view than the protection of national interests. The principle of the law of the nationality stands condemned, not merely because it creates difficulties in the case of the United States and the British Commonwealth, but also on other grounds. It introduces an element of uncertainty, because merchants accepting a bill or cheque in payment, or bankers who discount such an instrument, cannot be expected to carry in their heads all the national rules relating to the capacity of infants, married women and other persons. How is an English banker to know, for instance, that he is dealing with one who is a prodigal under French law and thus incapable of contracting? This difficulty is in fact recognized by the law of France and Germany. Both these countries, whilst pronouncing for the law of nationality in theory, apply their own law in practice to engagements contracted within their territories. The old German law did this openly,[1] whilst French law arrives at the same result by refusing to apply the national law of a signatory of a bill if to do so would be injurious to the interests of a French litigant.[2] In other words, where the matter becomes crucial nationality disappears into the background both in French and German law and the law of the place of the contract prevails.

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[1] Cf. the Report by M. Diena (Italian delegation) in *Records of the Conference of* 1930, at p. 155, from which it appears that the object of the reference to renvoi was to permit of the application of the law of the domicile in certain cases, with a view to conciliating the Anglo-American countries. See the objections to renvoi stated with great cogency by Lorenzen, *op. cit.* p. 176, and 27 *Yale Law Journal*, p. 509.

[2] Hirsch, *op. cit.* p. 1338, gives a number of illustrations of the curious results following from the use of renvoi in this case.

[3] See the speeches of M. Asser (Netherlands), *Records of the Conference of* 1930, p. 347, M. Giannini (Italy), *ibid.* p. 348, and Herr Ullmann (Germany), *ibid.* p. 348.

The law of the domicile is likewise inadmissible as a solution of the problems arising out of capacity. To apply it may accord with the general principles of private international law, but the importation of the concept of domicile into a Uniform Law of a commercial character would be disastrous owing to the varying theories which have been formulated in different countries as to the nature of domicile, and the difficulties of proof which arise whenever an alleged change of domicile is challenged.

The case for the adoption of the law of the place of the contract appears to be overwhelming in this instance. It is the only criterion which functions in practice, as is shown by the policy of the French and the German laws. All other solutions are open to grave objections and it seems to be clear that the only satisfactory end to the present controversy is, either to refrain from laying down any rules (a policy which would probably not involve any very serious inconvenience), or else to adopt the law of the place of the contract as the governing principle.

The meaning to be attached to the words *locus* or " place " as used in this connexion has given rise to considerable discussion.[3] The prevailing view in continental law is that it means the place of signature, whilst Anglo-American law regards it as the place at which the instrument is delivered. Closely akin to this problem is the further question whether the indication on the bill itself of a place of signature or delivery is to be conclusive or whether it merely creates a rebuttable presumption that the signature was affixed or delivered, as the case may be, at the named place. These are questions which arise not only in relation to the capacity of a signatory, but also as regards the validity in form of an instrument and the obligations of the signatory. They will, therefore, be dealt with separately at a later stage of the present inquiry.[4]

Formal Validity.—This is no doubt the least controversial of the various problems which have to be faced by the draftsman of a Uniform Law, because an unusual degree of unanimity exists as to the rule which should prevail in this instance. It is true that a theoretical distinction is sometimes drawn between formal or extrinsic and essential or intrinsic validity,[1] but it does not seem to be suggested anywhere, so far as the writer is aware, that this classification is a matter of practical moment.[2] It is generally admitted that the basic rule should be the control of formal validity, in both these senses, by the *lex loci contractus*.[3] A good deal of discussion has, however, taken place as to whether this rule should be absolute or merely permissive,[4] and as to whether an instrument which is invalid in point of form in the country of issue should nevertheless be accorded recognition if it subsequently circulates in a country in which no objection can be taken to it in a formal sense.

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[1] *Wechselordnung*, § 84; Lorenzen, *op. cit.* p. 155.

[2] This is the result of French case law, which has created a *jurisprudence constante* on the point (*Affaire Lizardi*, Sirey, 1861, 1, 305; *Affaire Graffenried*, Dalloz, P. 1892, I, 29). See also Niboyet, *Manuel de Droit International Privé*, § 600, where these two cases are dealt with as an application of the doctrine of unjust enrichment.

[3] See Lorenzen, *op. cit.* p. 82 *et seq.*

[4] *Post*, p. 70.

The two Geneva Conventions have dealt with these questions in a different way because it was thought that the special characteristics of a cheque called for separate treatment.[5] Art. 3 of the Convention of 1930 (bills and notes) provides as follows:

> The form of any contract arising out of a bill of exchange or promissory note is regulated by the laws of the territory in which the contract has been signed.
>
> If, however, the obligations entered into by means of a bill of exchange or promissory note are not valid according to the provisions of the preceding paragraph, but are in conformity with the laws of the territory in which a subsequent contract has been entered into, the circumstance that the previous contracts are irregular in form does not invalidate the subsequent contract.
>
> Each of the High Contracting Parties may prescribe that contracts by means of a bill of exchange and promissory note entered into abroad by one of its nationals shall be valid in respect of another of its nationals in its territory, provided that they are in the form laid down by the national law.[6]

This Article is interesting because it is an admirable illustration of the effects of the policy pursued at Geneva in dealing with conflicts of laws, which was to secure uniformity as rapidly as possible by giving satisfaction to as many different points of view as could be squeezed into the four walls of a clause without rendering it altogether contradictory in terms. It starts by adopting the law of the place of the contract as the basic rule in the first and second paragraphs, but proceeds in the third paragraph to give effect to an exception taken from the old German Exchange Law [1] which enables a territorial court to recognize the validity, as between its own nationals, of a bill signed and issued abroad which is invalid by the law of the place of the contract but accords with the territorial law of the court. This result followed from the persistent and skilful advocacy of the German delegation favoured by the fact that the Conference, at this stage of its proceedings, was under the shadow of a time limit for discussion.

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[1] See for instance Niboyet, who does not press the matter to a conclusion, *op. cit.* at p. 657, note (4). Beaucé, *op. cit.* at p. 100.

[2] See the conclusion arrived at by Lorenzen, *op. cit.* at pp. 99, 100, where the question is discussed at length; and see also Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 Yale L.J., p. 565; Beale, *What Law Governs the Validity of Contracts?* 23 Harv. L.R., p. 1.

[3] Subject to the meaning of the term *locus* or place which is discussed hereafter.

[4] Until 1909 the rule was regarded as imperative by the French courts, but since then the tendency has been to regard it as permissive (*Revue de Droit International Privé*, 1909, p. 906). The old German law accepted the permissive rule where German nationals enter into a contract in a foreign country (*Wechselordnung*, § 85). Lorenzen, *op. cit.* p. 92.

[5] Report by M. Diena, *Records of the Conference of* 1931, at p. 114.

[6] *Records of the Conference of* 1930, p. 71.

Be this as it may, it remains a matter for regret that the Conference should have seen fit to adopt an exception from the basic rule and thus sanction a distinction between rights and liabilities incurred by foreigners and nationals respectively when a contract is entered into abroad. It cannot be expected that the non-signatories will regard this rule with favour, especially in view of the fact that the exception may have unexpected consequences. Let us suppose that A, a German, indorses a bill in Italy to B, an Englishman, in a form which is valid by German law but not by Italian law. B cannot sue A in a German court. On the other hand if B transfers the same bill in England to C, another German, by an indorsement valid in German but not in Italian or English law C can sue A in Germany though he has no rights against B. In other words, the liability of A depends entirely on what his indorsee does with the bill. If B instead of indorsing to C, a German citizen in England, had endorsed to D, a Swedish subject in England, then A would escape liability on the bill. This is a result which cannot be regarded with equanimity from the international point of view, and it is perhaps permissible to state quite plainly that this exception is one which should not be allowed to appear [2] in an International Code which purports to see that justice is done between all the nations.[3]

The second paragraph of Art. 3 does not seem to call for comment. It may perhaps be difficult to justify it on principle, but it accords with the dictates of commercial honesty and expediency and there should be no difficulty in adopting it.[4]

The Convention of 1931 on conflicts of laws arising out of cheques has dealt with the above-mentioned questions in a somewhat different way. Art. 3 of that convention is to the following effect:

> The law of the country in which the cheque is payable determines the persons on whom a cheque may be drawn.
>
> If under this law the instrument is not valid as a cheque by reason of the person on whom it is drawn, the obligations arising out of the signatures

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[1] *Wechselordnung*, § 85.

[2] Hirsch, *op. cit.* in this connexion quotes a German proverb, "*Wer den guten Tropf hat soll auch den bösen geniessen.*"

[3] This accords with the view expressed by Lorenzen, *op. cit.* at p. 99.

[4] Cf. Bills of Exchange Act, 1882, s. 72 (1) (*b*); *Wechselordnung*, § 85. Lorenzen (*op. cit.* at p. 103) approves of the adoption of the relevant provision in the English Act with a change in wording designed to make it clear that it applies to supervening contracts as well as to the original instrument.

affixed thereto in other countries whose laws provide otherwise shall nevertheless be valid.

Art. 4 supplements this by providing that:

> The form of any contract arising out of a cheque is regulated by the laws of the territory in which the contract has been signed. Nevertheless it shall be sufficient if the forms prescribed by the law of the place of payment are observed.
>
> If, however, the obligations entered into by means of a cheque are not valid according to the provisions of the preceding paragraph, but are in conformity with the laws of the territory in which a subsequent contract has been entered into, the circumstances that the previous contracts are irregular in form shall not invalidate the subsequent contract.
>
> Each of the High Contracting Parties may prescribe that contracts by means of a cheque entered into abroad by one of his nationals shall be valid in respect of another of his nationals in his territory, provided that they are in the form laid down by the national law.

The first paragraph of Art. 3 of this convention is designed to meet the situation which is created by the fact that in certain countries cheques may be drawn on persons other than bankers and that this practice is sanctioned by the Uniform Law of 1931 on cheques.[1] It seems to be clear that the question whether an instrument drawn on a non-banker is to possess the attributes of a cheque or not is a matter which ought to be determined by the law of the place of payment, since any other rule would mean that countries which only recognize instruments drawn on bankers as cheques would be obliged to give effect to irregular instruments. It was pointed out, however, in the course of debate that if the rule stopped at this point some inconvenience might result in certain continental countries, and a second paragraph was therefore added so as to enable the holder of an irregular instrument to enforce his right of recourse against the drawer and other signatories, if the law of the countries in which they have assumed their obligations does not require that the drawee should be a banker. Assuming that a drawee need not be a banker (which is a position unlikely to be acceptable to the Anglo-American countries), the proviso appears to be unobjectionable as it is based on the consideration that the security of domestic dealings with cheques should be assured.[2]

Art. 4 of this convention[3] deals with the remaining requirements as to formal validity. The first paragraph of this article is permissive in character, since it allows of the application to a cheque either of the law of the place of the contract or of the law of the place of payment. It was adopted without discussion,[1] and the grounds for the decision of the Conference are, therefore, a matter of conjecture. We may assume, however, that the Conference concurred in the explanation given in M. Diena's Report that the addition of the alternative rule of the *lex loci solutionis* was intended to promote the security of international cheque transactions.[2] But should this decision be allowed to pass unchallenged? A fixed rule must apply to commercial paper in matters of form, and so far as the validity in point of form of an instrument is at stake the rule as generally formulated is one which applies the law of the place of issue. This opinion, which undoubtedly represents the prevailing Anglo-American point of view, is based on the need for certainty.[3] The question is perhaps less important in the case of cheques than as regards bills of exchange, because cheques are in practice almost invariably drawn on forms supplied by the drawee bank. Cases may occur, however, under the Convention in which cheques are drawn on non-bankers and no prescribed forms are used. Further, the effective use of the prescribed cheque form presupposes recognition of the place named on the form as being the actual place of drawing even if the cheque may have been drawn elsewhere, a matter which must be regarded as controversial and is discussed hereafter.[4] The question is, in other words, one which cannot be treated lightly, and the arguments in favour of a unitary rule appear to be overwhelming in this instance. There is much to be said in favour of the adoption in an international code of the *lex loci solutionis* as the rule in the case of the formal validity of a cheque, since payment has to be made promptly and the drawee ought not to be troubled with any doubts as to whether the instrument which is presented to him can be regarded as a cheque under the law of a foreign country in which it has been drawn. This is perhaps what was intended by the Conference, but, if so, it would have been much better to omit any reference to the law of the place of the contract and to prescribe the law of the place of payment as the sole and governing rule. In any event the first paragraph of Art. 4 seems to be inadmissible in its existing form owing to its permissive character.

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[1] See Art. 4 of Annex II of the Convention of 1931, providing for a Uniform Law of cheques.

[2] Report by M. Diena, *Records of the Conference of* 1931, at p. 114. Cf. Art. 3, para. 2, of the Convention of 1930, regulating conflicts of laws in regard to bills and notes.

[3] Cf. Art. 3 of the Convention of 1930, regulating conflicts of laws arising out of bills and notes.

The second and third paragraphs of Art. 4 merely repeat the provisions of the parallel Article in the Convention relating to conflicts of laws arising out of bills and notes and do not call for further discussion.

The Obligations of Parties to Negotiable Instruments.—Some considerable difficulty was experienced at Geneva, during the discussion of the draft convention on conflicts of laws arising out of bills and notes, in arriving at a solution of this problem. In fact it was proposed at one stage of the debate that the attempt to deal with the matter should be abandoned, but a compromise was ultimately reached, taking the form of Art. 4 of the Convention of 1930 which is in the following terms:

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[1] *Records of the Conference of* 1931, p. 321.

[2] Report by M. Diena, *Records of the Conference of* 1931, at p. 114.

[3] Lorenzen, *op. cit.* pp. 98, 99; 20 Yale L.J. at p. 457.

[4] See *post*, p. 72.

> The effects of the obligations of the acceptor of a bill of exchange or maker of a promissory note are determined by the law of the place in which these instruments are payable.
>
> The effects of the signatures of the other parties liable on a bill of exchange or promissory note are determined by the law of the country in which is situated the place where the signatures were affixed.

The Convention of 1930 therefore applies the law of the place of payment to the question of the liability of an acceptor of a bill or the maker of a note, and the law of the place of the contract to the liability of the other signatories. This is a compromise which appears to have much to recommend it. The controversy on the question of the proper law to determine the liability of a signatory to a bill seems to have narrowed down to a choice between the law of the place of the contract and the law of the place of payment. Nationality is obviously an unsuitable criterion for this purpose and is ruled out by modern writers. The law of the domicile of a signatory has much to support it from a theoretical standpoint, but it is generally agreed that it involves such serious difficulties of proof in contested cases as to render it impossible to adopt it as a working rule. Moreover a very awkward situation would arise if there were joint drawers or indorsers of an instrument each of whom happened to be domiciled in a different country. We are thus left with four possible solutions: the law of the place of the contract; the law of the place of payment; the law of the place in which the bill was first issued;[1] or a combination of two or more of these criteria.

But there is a preliminary question to be decided. Are we to regard the contracts constituted by the drawing, acceptance or indorsement of a bill as separate contracts each to be governed by an appropriate rule, or is a single rule to be postulated as applicable to all these contracts? The single-rule theory is to be preferred in so far as it prevents a situation from arising in which one of the parties may be held liable but at the same time may be deprived of his right of recourse against a previous party because the liability of the latter falls to be determined under a different system of law. The objection to this view of the matter lies in the fact that if a unitary rule is adopted it follows that the rule must take the form of the application of the law of the place of payment because, as has been pointed out by Professor Lorenzen,[2] many problems arise which cannot be solved in a reasonable manner by resorting to the law of the place of the contract or to the law of the place of issue, *e.g.* presentment, protest, the date of maturity, etc. These are questions which can only be determined satisfactorily, in the business sense, if they are controlled by the law of the place of payment. In other words, unity of rule in this case means the adoption of the *lex loci solutionis* and

[1] See the statement by Professor Sulkowski, *Records of the Conference of* 1930, p. 358.

[2] Lorenzen, *op. cit.* p. 127.

stands or falls by the result of the weighing up of the respective advantages and disadvantages of that law as compared with the law of the place of the contract. But if the single-rule theory is discarded the balance inclines to the side of the law of the place of the contract so far as the liability of the drawer and indorsers is concerned, and then swings round again to the law of the place of payment in the case of the acceptor or maker. A drawer or an indorser cannot be taken to have consented to place himself under the regime of a legal system other than his own, unless he has made his intention manifest in some form or other.[1] Moreover the place of payment is not always stated and an indorser may have no means of knowing where the bill will ultimately be presented for payment. Therefore, in spite of the fact that the result may be to deprive a party in certain cases of right of recourse, the reasonable rule seems to be that the liability of a drawer or an indorser should be determined in accordance with the law of the place of the contract. It has been suggested that there should be a unitary rule giving effect to the law of the place at which the drawer issues the instruments. This view of the matter has received the approval of the Institute of International Law,[2] but it is highly artificial in character and appears to be open to all the objections which can be advanced against the adoption of the law of the place of payment as a single rule.

The liability of the acceptor or maker rests on a somewhat different footing. A bill may be accepted payable in a different place from that in which the acceptance is placed on the bill. In such event it seems to be clear that the acceptor intends his liability to be governed by the law of the place of payment, and it would be highly inconvenient if the rule were to be otherwise. If an acceptor were put in a position to plead that his liability is governed by foreign law, the consequence might be that there would be a multiplication of purely dilatory defences.

It is submitted, therefore, that the sound rule from the business point of view is that the liabilities of the drawer and indorsers of a bill should be governed by the *lex loci contractus* and that the liability of the acceptor should fall to be determined by the *lex loci solutionis*. This is the course which was adopted at Geneva in 1930, and it may be regarded as one which might be followed by the draftsmen of any future Uniform Law which deals with questions of conflict. The Conference was, however, reluctant to face the entire consequences of a rule which might lead to the determination of the rights and liabilities of the drawer and indorsers of a bill according to different systems of private international law and thus possibly deprive a party of his right of recourse. This feeling found its expression in Art. 5 of the Convention of 1930 (bills and notes), which is to the following effect :

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[1] *E.g.* where he signs in a foreign country, or signs in his own country and the bill is headed as being issued in a foreign country.

[2] *Annuaire de l'Institut de Droit International*, vol. viii, p. 122.

> The limits of time for the exercise of the rights of recourse shall be determined for all parties by the law of the place where the instrument was created.

This Article is extremely ambiguous in its phraseology. It may be observed, parenthetically, that the word "created" was used at the request of the French delegation, which desired to avoid the employment of the word "issued" for some reason which was not fully explained, but may be taken to be a desire that it should be clear that reference was made to the original place of the issue of the instrument by the drawer. Herr Quassowski, the Chief of the German delegation, also pointed out the ambiguity connected with the use of the words "limits of time." Did they refer to prescription in the sense of an extinction of the right of recourse by prescription of, or to the time limit within which, a dishonoured bill must be protested ?[1] It would seem that the Article is intended to deal with the time within which protest must be made, but the matter does not appear to have been cleared up beyond doubt.[2]

The policy followed by the Conference of 1931 in dealing with the obligations of signatories to cheques was of different character. In this case the governing rule was Art. 5, which runs as follows :

> The law of the country in whose territory the obligations arising out of a cheque have been assumed shall determine the effects of such obligations.

The rule thus formulated was supplemented by Art. 6, which deals with the right of recourse along the same lines as those followed in the case of the earlier convention and by Art. 7, which deals with a number of questions in which the drawee is concerned.[3] The general scheme of Arts. 5 and 7 appears to be that the rights and liabilities of the drawer and indorsers of a cheque as between themselves (apart from time limits for rights of recourse) are to be determined by the law of the place of the contract, and that all questions which may bring the drawee into any dispute with a holder, including protest, are to be determined by the law of the place of payment.

The Italian delegation pressed for the adoption of the law of the domicile of the drawer as the paramount rule on the grounds that cheques were not negotiated to the same extent as bills and that the drawer's liability therefore took precedence over all other considerations.[4] This was not the view which prevailed. The Conference was disinclined to adopt the criterion of domicile in any shape or form,[5] and the predominant opinion was that the drawee was the party upon whom attention must be centred.

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[1] *Records of the Conference of* 1930, p. 362.

[2] Cf. Report of M. Diena (Italian delegation), *ibid.* at p. 156.

[3] These include post dating, time for presentment, certifications and visas on cheques, partial payment, crossing, cover for the cheque, countermand, form of protest, and the measures to be taken in the event of the loss of a cheque.

[4] *Records of the Conference of* 1931, p. 322.

[5] The Italian proposal defined domicile as the "commercial establishment" of the drawer, or failing such then his "habitual residence."

The solution arrived at by the Convention of 1931 with regard to cheque obligations does not appear to be unacceptable from the point of view of business expediency. In any event cheques do not as a rule pass from hand to hand in international commercial intercourse like bills of exchange, and the questions which are likely to arise in practice are chiefly those, such as protest and countermand, which ought to be determined by the law of the place of payment. The question of cover for a cheque, or "*provision*," is one of particular importance which will be dealt with hereafter.[1] But taken as a whole the possibility of conflict circles to a very large extent round questions which only arise after a cheque has been presented for payment.

The Place of the Contract.—There can be no more vivid illustration of the peculiar difficulties which are encountered in any attempt to secure uniformity of private international law than the problem with which we are now confronted.[2] What is it that we mean when we speak of "the law of the place of the contract"? In the case of commercial paper there are two possible interpretations of the phrase. The "place" may be either the locality in which a signature is affixed to an instrument or the place at which it is delivered to the holder. The first of the solutions is the one which prevails in the law of Continental Europe,[3] whilst the second is that which has been adopted by the Anglo-American systems.

There is no need to insist on the importance of this question in any scheme of unification, because it is abundantly clear from its very nature that it is fundamental. In fact, it must be solved if uniformity is to be anything more than a pretence. Professor Lorenzen[4] apparently regards the problem as insoluble, and it must be admitted that it is probably the most serious of all the difficulties which will have to be overcome if any future attempt to unify the rules of conflict is to be crowned with success.

A preliminary survey of the ground reveals the existence of three possible methods of dealing with the question. The first is to seek for some new rule of an international character, the second consists in the acceptance by all the jurisdictions concerned either of the Anglo-American or the continental concept of the *locus*, whilst the third would leave the question to be determined by a territorial court in accordance with its own rules of conflict. It is submitted that the second of these alternatives is the only one which holds out any prospects of success. The first seems to be impracticable because it is not possible to frame any compromise between the adoption of the place of signature as the criterion and the recognition of delivery as the decisive factor. The third alternative is clearly inadmissible ; the application of the *lex fori* may perhaps prove to be the best solution in the case of certain difficulties connected with the theory of qualifications, but the problem is basic in this instance and too serious in character to be evaded under the cover of a rule which would, in effect, be no rule at all.

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[1] *Post*, p. 72.

[2] For a very exhaustive and learned discussion of this and kindred problems see Lorenzen, *The Theory of Qualifications and Conflicts of Laws*. 20 Columbia L.R., p. 247.

[3] Lorenzen, *loc. cit.* It is also the solution which was adopted in both the conventions signed at Geneva in 1930 and 1931. See *ante*, p. 67.

[4] "It is difficult to see how an internationalization is possible of such concepts as *lex loci contractus*." Lorenzen in 20 Columbia L.R. at p. 282.

It becomes necessary, therefore, to endeavour to estimate the respective advantages and disadvantages from a practical point of view of the two rival theories which occupy the field at the present time. The place of signature has in general much to recommend it as the governing concept. It is free from the complexities which surround the definition of "delivery" and have given much trouble in cases in which an instrument has been signed and them committed to the post.[1]

On the other hand, the Anglo-American view that a contract is not constituted until an instrument has been placed either actually or constructively in the hands of the party to whom it is issued or negotiated appears to correspond more closely to commercial requirements. It is undoubtedly the better rule in the case of bearer instruments, as these give rise to a situation which is only covered in part by a test which relies solely on the fact of signature. The adoption of the continental rule would also create difficulties in those cases in which it is desired to deliver an instrument in escrow for some particular purpose.[2] It might also be necessary to consider its operation in respect to certain commercial contracts such as C.I.F. contracts of sale and banker's commercial credits which involve the employment of bills of exchange for ancillary purposes.

It is submitted that it is possible, nevertheless, to attach too much importance to the maintenance of either of the theories which we have been discussing. Delivery must coincide in a great many instances with the signature of an instrument, and could perhaps be made to do so in other cases by some modification of business practice. Moreover, if it is agreed that the liabilities of an acceptor or maker are to be governed by the law of the place of payment, we are only concerned with the *lex loci contractus* so far as it affects the liability of the drawer and the indorsers. There does not, therefore, appear to be any insuperable obstacle to the abandonment by one or the other of the two rival systems of its definition of the term " place of the contract," especially if it is made clear that the change is only to operate in respect of instruments which circulate outside territorial limits. Any inconvenience which might result from this sacrifice would, it is submitted, be outweighed by the advantages which would follow from the removal of this vexed question from the position which it otherwise occupies of blocking all endeavours to secure uniformity in the rules of conflicts relating to negotiable instruments. The question whether the continental law shall give way to the Anglo-American rule or vice versa, is one of great delicacy, and cannot very well be discussed in this place. It may be observed, perhaps, that we have here an instance in which a concession by the one or the other of the parties might very well be counterbalanced by favours granted in other directions in a general scheme of unification.

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[1] See the illustrations given in Chalmers, *Bills of Exchange Act*, 1882 (10th ed.), at p. 61 ; *Ex. p. Cote*, (1873) L.R. 9, Ch. 27 ; *Kleinwort* v. *Comptoir d'Escompte*, [1894] 2 Q.B. at p. 158 ; *Thairlwall* v. *Great Northern Rly.*, [1910] 2 K.B. 509.

[2] See, for instance, *Denton* v. *Peters*, (1870) L.R. 5 Q.B. 475 ; *Bell* v. *Ingestre*, (1848) 12 Q.B. 317 ; *Commercial Bank* v. *Morrison*, (1902) 33 Can. S.C.R. 98.

There are certain aspects of this question which must be considered in further detail. One of the objections to the adoption of the criterion of the *lex loci contractus* is that, in the case of an incompetent person, it may become a loophole by which he can evade the rules of his national law which forbid him to assume contractual obligations. This does not, however, appear to be a matter of any real commercial importance, and if it is insisted upon it only furnishes an additional argument in support of the view that the topic of capacity is one which should be deleted from any proposals for unification. More serious are the questions which arise if an instrument is dated from a particular place but is, in fact, either signed or delivered, as the case may be, in some other place. The rules of American law might very well be selected for the purpose of meeting this situation, and there should be a presumption that an instrument has been signed or delivered at the place from which it is dated, and that where the holder of the instrument has taken it without notice of the actual place of signature or delivery such presumption shall be conclusive. As regards indorsements there should likewise be a presumption that, unless otherwise stated, the bill has been indorsed at the place of issue, and such presumption should also be treated as irrebuttable if the instrument is in the hands of a holder in good faith without notice.[1]

The Theory of Provision or Cover.—A somewhat serious obstacle to unification is to be found in the rules relating to " *provision* " or cover which are peculiar to the law of France and of certain other countries which have adopted the French *Code de Commerce* as a model.[2] The delegates of these countries attending The Hague Conferences of 1910 and 1912, and the Geneva Conferences of 1930 and 1931, were adamantine in their insistence on the retention of this rule, and it must be assumed that any proposals for uniformity which ignored this question would have very little prospect of success.[3]

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[1] See the decisions of the American courts referred to in Lorenzen, *op. cit.* at pp. 84, 85. It is somewhat curious that English case law should have failed, hitherto, to deal with these questions, but this fact appears to support the writer's contention that the matter may not be of so much commercial importance as is sometimes alleged.

[2] Code de Commerce, Acts 116–117. For a detailed discussion of the rule see Lyon-Caen and Renault, *Manuel de Droit Commercial* (15th ed.), § 612, *et seq.*; Bouteron, *Le Chèque*, p. 127 *et seq.*; Drouets, *La Provision en matière de chèque.* Lorenzen, *op. cit.* pp. 29, 134.

[3] See the statement of Professor Percerou (French delegation), *Records of the Conference of* 1931, at p. 329.

The notion of *provision* is one which may seem strange to an Anglo-American lawyer, but it is a fundamental rule in the French law relating to commercial paper. The underlying theory is that every bill of exchange or cheque is intimately connected with the assignment of a debt.[1] It is necessary, therefore, that the drawer should provide cover for the amount of the instrument so as to ensure its payment at maturity. This cover may take the form either of funds remitted by the drawer to the drawee or of a debt due from the drawee to the drawer. The holder of a bill acquires not merely the property in the bill but also a right to the cover and can sue the drawee, and if the drawee is insolvent he has a preferential claim to the cover as against the general body of creditors.

Whether this feature of the French law is one which should be perpetuated or not is a question which is beyond a lawyer's province. Its importance for our present purpose lies in the fact that it comes into collision with the German theory that the issue or negotiation of a bill creates an obligation which is independent of any other transactions between drawer and drawee.[2] It is in even sharper conflict with the principle of Anglo-American law which, in the absence of some definite charge on an insolvent debtor's assets, refuses to give preferential treatment to the holder of a bill as against his fellow-creditors.[3]

It was found to be necessary at Geneva to give satisfaction on this question to the French and certain other delegations. Art. 6 of the Convention of 1930 on conflicts arising out of bills and notes provides that " the question whether there has been an assignment to the holder of the debt which has given rise to the issue of the instrument is determined by the law of the place where the instrument was issued." Art. 7 (6) of the Convention of 1931, on conflicts arising out of cheques, follows a different principle. It says that " the law of the country in which the cheque is payable shall determine . . . whether the holder has special rights[4] to the cover and what the nature is of these rights."

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[1] " A bill of exchange in its origin was an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction." Chalmers, *Bills of Exchange Act*, 1882, Introduction to the third edition. See also the statement by M. Asser (Netherlands delegation), *Records of the Conference of* 1931, at p. 331.

[2] The Reichsgericht has in an isolated case given effect to the rule of *provision* as regards a bill drawn on Germany, basing its decision on the intention of the parties concerned that the transactions should be governed by French commercial usage. Statement by Herr Albrecht (German delegation), *Records of the Conference of* 1930, at p. 364.

[3] A curious exception is the rule in *Ex. p. Waring*, (1815) 19 Ves. 345. Cf. *Ex. p. Dever* (No. 2), (1884) 14 Q.B.D. 611, and see Gutteridge, *Banker's Commercial Credits*, pp. 85, 86.

[4] The words "special rights" were inserted to meet an objection taken by the Belgian delegation. Belgian law regards *provision* as being a kind of preferential lien or charge and not as amounting to an assignment. *Records of Conference of* 1931, p. 330.

These solutions were only reached after considerable opposition on the part of the German, Italian and Scandinavian delegations. The objections taken were most in evidence in the case of the discussion on Art. 7 (6) of the Convention of 1931 on conflicts of laws arising out of cheques. They were of a twofold nature; it was argued that it was inadvisable to deal with any question which involved interference with national laws on the subject of insolvency, and the Italian delegation also pressed for the determination of this question by the law of the drawer's domicile in the case of cheques as well as bills.[1]

In the end a solution was reached which applies the law of the drawer's domicile to cover for bills, and governs the matter in the case of cheques by the law of the place of payment. This somewhat illogical result can perhaps be explained by the fact that the prevailing opinion at the 1931 Conference was that all matters which might concern the duty of the drawee of a cheque as regards payment were to be controlled by the law of the place at which payment is to be made.

It seems to be clear that the solution in the case of bills of exchange is inadmissible so far as the Anglo-American countries are concerned. It is inconceivable that Great Britain would permit the distribution of the assets of an insolvent debtor to be invaded by a rule of foreign law which would place a foreign holder of a bill of exchange in a privileged position as compared with English creditors. The solution in the case of cheques does not have this result and may perhaps be regarded as innocuous. It is impossible not to feel some sympathy with the view that the matter is one which calls for regulation, in the interest of the countries which recognize the theory of *provision*. Thus if a cheque is drawn by a domiciled Englishman on a French banker in favour of a domiciled Frenchman an awkward situation will arise in the event of the insolvency of the drawer. The French holder will by French law have a right to demand payment from the French banker by virtue of the theory of *provision*, and the French banker may also have to satisfy the demands of the English trustee in bankruptcy who is entitled to the amount of the cheque under the provisions of the Bankruptcy Act of 1914, dealing with the relation back of the title of the trustee.[2] The Conference of 1931 was informed by the Chief of the French delegation that such cases had occurred in practice.[3]

There are two possible solutions. If the rules relating to *provision* were assimilated, *i.e.* if the law of the place of payment was made to govern in the case both of bills and cheques, the Anglo-American countries could not very well object, as this would avoid the introduction of the question of the preferential right of a bill holder into English or American proceedings for the liquidation of the assets of an insolvent debtor. But it would be preferable to omit all reference to this question from any future scheme for uniformity, as it is doubtful if any solution can be arrived at which would be generally acceptable.

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[1] See the statements by M. Giannini and M. Diena (Italian delegation), *Records of the Conference of* 1931, at pp. 331, 332, and the statement by M. Ekeberg (Swedish delegation), *ibid.* p. 332.

[2] Bankruptcy Act, 1914, s. 37; as qualified by s. 4 of the Bankruptcy (Amendment) Act, 1926.

[3] Statement by Professor Percerou, *Records of the Conference of* 1931, p. 329. The prevailing view on the Continent at present appears to be that the question of *provision* must be decided by the law of the domicile of the drawer. Lorenzen, *op. cit.* p. 134, note 262.

Other Questions to be determined.—The two conventions on conflicts of laws which were adopted at Geneva do not exhaust all the questions which may arise. Nothing is said, for instance, about the determination of the amount which is due if a bill or cheque is drawn in a foreign currency,[1] or about the method of fixing the due date of a bill drawn in one country and payable in another.[2] On the other hand, the conventions contain specific provisions dealing with the case of loss or theft of instruments, a matter which is declared to be governed by the law of the place of payment.[3] The question whether acceptance may be restricted to part of the amount of the bill, or whether the holder is obliged to accept part payment of a bill or cheque, is also dealt with, and is regulated by the law of the place of payment.[4] These provisions of the two conventions do not call for any lengthy comment. The Articles relating to the loss or theft of instruments can be accepted without demur, as no other solution would operate in practice. But the Articles which deal with part acceptance and part payment may prove to be a stumbling-block owing to the disinclination of English bankers to accept any rules which would recognize the right of the acceptor of a bill to compel the holder to take part payment.[5]

It is necessary, however, to consider the questions of presentment for payment, protest and notice of dishonour somewhat more closely, since they are of very great importance from the international point of view owing to the marked differences which exist between the Anglo-American and continental laws in this respect. The nature of the rules of the conflict of laws which are to be applied in this instance will depend on whether the acts in question are regarded as conditions precedent to the fulfilment of the obligations which a signatory of an instrument has assumed, or whether they are to be treated as connected with the performance of such obligations. Or, to put the matter in another way, it is important to distinguish between the necessity for these acts and the formalities which must be observed when they are carried out. So far as formalities are concerned, *e.g.* the time and place at which protest must be made, there is universal agreement that they must be governed by the law of the country in which the act is to be done. Opinions are divided on the question of the law which is to decide whether presentment or protest must be made, or if notice must be given. The simplest solution would be to adopt the law of the place of payment as a single rule, and this is the view which has been taken in the Bills of Exchange Act, 1882,[1] and the Geneva Convention of 1931 on conflicts of laws arising out of cheques.[2] Theoretically there are strong arguments in favour of a rule which would determine the need for presentment, protest or notice, by the application of the law of the place of each of the contracts entered into by the respective signatories, but this rule would work very unfairly in practice owing to the difficulty and delay involved in ascertaining not only the place of each of the signatures but also the law of such place.[3]

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[1] See Bills of Exchange Act, 1882, s. 72 (4).

[2] *Ibid.* 72 (5).

[3] Convention of 1930, Art. 9; Convention of 1931, Art. 7 (8).

[4] Convention of 1930, Art. 7; Convention of 1931, Art. 7 (4).

[5] See the comments of the British Government in the League of Nations brown book (*Preparatory Documents, supra*), at p. 89; also the statement of the British delegate and the subsequent discussion, *Records of the Conference of* 1930, pp. 249 *et seq.*

The Geneva Convention of 1930 on conflicts of laws arising out of bills and notes [4] deals solely with the formalities which are to be adopted. It is to be inferred that the question of the necessity for presentment, protest or notice is governed by Art. 4 which prescribes the *lex loci solutionis* as the governing rule in the case of the acceptor, and the *lex loci contractus* as the law which is to be applied to the determination of the liabilities of the drawee and indorsers.[5] As we have seen, the Convention of 1931 on conflicts of laws arising out of cheques has adopted the single rule of the law of the place of payment.[6] It would not seem to be impossible to reach agreement on this question if theoretical considerations are discarded in favour of the search for a rule which has most to recommend it in the business sense. It is desirable from this point of view to adopt a unitary rule, and the balance inclines strongly towards the law of the place of payment.

Conclusions.—It must be admitted that some of the difficulties which have to be faced in any endeavour to secure uniformity in this branch of private international law are of such a formidable character as to call for reflection. On the other hand, the existing state of anarchy and confusion is a reproach to the mercantile countries of the world, and it should not be allowed to continue without a serious effort to find a remedy.

The outlook is not so black as might seem at first sight, because here and there one finds substantial uniformity of rule, as, for instance, in the case of questions of form. The problems which centre round capacity seem to engender a storm of controversial fury, which is wholly disproportionate to the interests which are at stake. It would probably be wise to put this embarrassing question on one side and to leave it to be dealt with by the national laws of the various countries. Certain questions, such as the definition of the term "place of the contract," and the methods to be adopted in dealing with the thorny topic of *provision*, will call for sacrifices from one or other of the two great systems of law which will stand face to face in future if the Geneva Conventions meet with widespread acceptance. It is highly improbable that any scheme for the complete and world-wide unification of the national laws of commercial paper will meet with success in this or the succeeding generation, and herein lies perhaps the strongest argument for an early renewal of the endeavours to provide uniform rules of private international law for the settlement of the conflicts arising out of the national laws of negotiable instruments. The attempt may fail, but it will at least be worth while to make it.

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[1] S. 72 (3).

[2] Art. 7 (2) and (9).

[3] Lorenzen, *op. cit.* p. 153; *Hirschfield* v. *Smith*, (1866) L.R. 1 C.P. 340; *Guernsey* v. *Imperial Bank of Canada*, (1911) 188 Fed. 300.

[4] Art. 8.

[5] See the *Records of the Conference of* 1930, p. 365.

[6] Art. 7 (2) (9).

THE POSITION OF THE AMERICAN INDIAN IN THE LAW OF THE UNITED STATES.

[*Contributed by* W. G. RICE, ESQ., JR., *University of Wisconsin Law School.*]

THE United Press recently reported that a union of all the Indian tribal governments of the United States was in process of formation under the patronage of the U.S. Commissioner of Indian Affairs, who is the chief (under the Secretary of the Interior) of the federal Indian service. What sort of change, if any, in the legal relations between the Indian tribes and the general government this forebodes I cannot say; but it is a passing indication of the indisputable fact that, though the number of Indians in the United States is very small compared with the rest of the population, the Indian tribes are not politically or legally merged into the general mass of Americans.

Law to-day, particularly Anglo-American law, is so markedly territorial that it is a little surprising to find that the law ruling Indians is primarily personal, albeit confined wholly or almost wholly to the so-called " Indian country," that is, the regions reserved for Indian habitation. This Indian law is not to be confused with the rules of racial segregation and discrimination which exist to some extent by state law and to a greater extent by social practice as against Negroes and Mongolians in several American states and which have occasionally included Indians; for this special regime has a history quite different. The Indians' legal position is due more to their independence of, than to their economic or political inferiority to, the ruling race. It is a " fragment of sovereignty," to use the phrase of Cuthbert Pound, Chief Judge of the New York Court of Appeals, in a recent article in the *Columbia Law Review*.

International law—white man's law—has recognized that discovery and occupation of a land inhabited by " savages " give the discovering state the sovereignty. In North America, where the natives north of Mexico were largely nomadic, their occupancy was easily displaced, sometimes by force, sometimes by purchase for next to nothing of their interests as possessors of the land. The region not needed by white colonists for habitation or cultivation remained " Indian country " where the Indians continued their nomadic life, gradually modified by contact with white men. Much the same developments occurred in South America wherever the Indians were not firmly settled, as was interestingly set forth by Judge Rodrigo Octavio in lectures at the Academy of International Law of The Hague in 1930.

As the white population grew in North America, the mass of Indians was pushed westward. The courts recognized tribal rights of possession that, while subordinate to the primary title of the sovereign, were entitled to protection from interference by individuals. A few Indians became "civilized," that is, detached from their tribe; and there was some intermarriage of whites and reds, though much less than in French Canada or Spanish Mexico; thus there was a gradual absorption of Indian stock as there has been of other non-English-speaking people who joined the American white community. Some Indians died from fatal innovations of white civilization—from over-indulgence in "fire-water," from new diseases, from starvation when the hunting grounds became inadequate. Though the total number of tribally organized Indians materially diminished, and some tribes completely disappeared, many survived, and certain tribes of fixed abode, like the Iroquois tribes of New York or the pueblo peoples of New Mexico, so firmly resisted the push of white civilization that they still continue to live on parts of their ancestral homelands. Gradually the "Indian country" was reduced till every tribe is now stationary and confined (not as individuals, but with respect to tribal existence) to a reservation too small to support it according to the ancient Indian mode of economy.

In the Atlantic coast states Indian reservations now are found only in Maine, New York and North Carolina. In the eastern half of the country reservations exist also in Michigan, Mississippi and Wisconsin, but most Indians now live west of the Mississippi River—principally in Oklahoma, New Mexico and Arizona, though reservations exist in most of the trans-Mississippi states.

For a quarter-century beginning about 1890 the national government pursued a policy of distributing these reserved lands by individual allotment to adult members of the resident tribe. Under the statute authorizing the allotments the Indian allottees were to become in time regular members of the general community, and the reservation was to cease to exist. It was during this period, we shall see, that the courts were most inclined to restrict the reach of Indian law. Though allotments are still possible, their day of popularity appears to be past. The course of abolishing reservations piecemeal is not likely to be resumed, for Indians have little interest or pride in private ownership. The legal title to the remaining reservation lands is either in the government (in moral trust for the tribe) or in the tribe as a legal group, but under the guardianship of the government.

All these Indian reservations now lie within the bounds of states, and state law applies to non-Indians who are on the reservations; for the reservations are not closed to the world and often are intersected by railroads, navigated rivers and highways. In North Carolina, Maine and New York the state legislative authority apparently reaches Indian inhabitants too, and Congress has extended the state law of Oklahoma to the so-called Five Civilized Tribes resident there; but in other states it is clear that the only legal authority over the Indians on a reservation, except that of their own tribe, is that of the national government. The extent of the survival of Indian autonomy therefore depends, except perhaps in a few eastern states, wholly on the will of the Congress of the United States. This brief description of the history and present legal situation may serve as an introduction to the fuller explanation of the law governing American Indians that follows.

The Constitution and the Indians.—What is the constitutional basis of the national authority over the Indians? The national government is one of powers delegated by the states; yet Indians are mentioned in the U.S. Constitution only twice—once to exclude " Indians not taxed " (a phrase never more explicitly defined, but probably meaning to-day Indians resident on reservations, that is, on land not taxed by the states) from the count for determining representation in the lower house of Congress; and again to empower Congress to regulate " commerce with foreign nations, among the several states, and with the Indian tribes." This commerce power is an express constitutional basis for Congressional action concerning the Indians, as is also, so far as appropriations for Indians are concerned, the power of Congress to raise and spend money " for the general welfare." But the regulation of Indians from Washington has gone much farther. Much power has been exercised because the whole Indian country, except the few eastern reservations, was formerly part of the national domain, with exclusive title and sovereignty (except to the extent it was recognized to be restricted by Indian occupancy) in the national government. In this respect, the reservations within the bounds of the original thirteen states, having a different history, are probably subject to a different legal regime. In Canada too the title to Indian country is in the provinces, not in the Dominion, as was finally decided by the Judicial Committee of the British Privy Council in 1888 in *St. Catherine's Milling Co.* v. *Queen*, L.R. 14, A.C. 46. The setting up of states in the territory once governed only from Washington has not affected the title of the nation to these lands. This ownership of the land supports a mass of Congressional and departmental regulations of land tenure on the reservations west of the Alleghenies; but even this, added to the express powers of Congress already mentioned, does not sustain the full extent of the national control of Indians wherever they are tribally organized. The chief foundation appears to have been the treaty-making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made. The colonies before 1776 (and the original states thereafter) often deal with the Indian tribes through political agreements. When in 1787 the Constitution made exclusive grant of treaty power to the national government, these precedents formed a strong basis for national dealings with Indian tribes, especially those beyond the bounds of any state. Habitually for nearly 100 years the nation treated with the Indians pursuant to the constitutional forms that were used in dealing with foreign states. And by a broad reading of these treaties the national government obtained from the Indians themselves authority to legislate for them to carry out the purpose of the treaties.

In view of the express grants of the commerce power and the expenditure-for-the-general-welfare power, of the fact that the greater Indian tribes lived on the national domain and not within any state (until the west was piecemeal admitted to statehood) and of the custom of dealing with Indian tribes by treaty, the United States Supreme Court has never found, so far as I can learn, that any Congressional regulation of Indians has been beyond the reach of national power. Indeed the net result is the creation of a new power, a power to regulate Indians. In *U.S.* v. *Kagama*,[1] the Supreme Court says the nation may govern them because, among other reasons, it "is necessary" and "has never been denied." Let us look at three of the leading cases that lead up to this position.

Already a hundred years ago in *Cherokee Nation* v. *Georgia*,[2] the court used the phrase, constantly repeated, that the Indians are "wards of the nation." In that case the Cherokee tribe unsuccessfully tried to sue the State of Georgia. The familiar rule of international law that a state cannot be sued without its consent is modified by the U.S. Constitution in that any state of the Union is made subject to suit by another state (domestic or foreign) in the Supreme Court. In reliance on this interstate suit clause of the Constitution, the Cherokee Nation instituted in the Supreme Court a legal proceeding against Georgia for interference with their freedom. But the Supreme Court held (with two justices dissenting) that it was without jurisdiction because Indian tribes were neither domestic nor foreign states. "They may," said the court, "more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage; their relation to the U.S. resembles that of a ward to his guardian."

In *Worcester* v. *Georgia*,[3] decided the next year, Worcester, a white missionary among the Cherokees, had been convicted in a Georgia court of violating a state law requiring whites to be licensed to reside in the Cherokee country of Georgia—one of a series of Georgia laws relating to these Indians. The court, in setting aside his conviction, took occasion to declare that treaties between the United States and the Cherokees excluded Georgia, though it was one of the original thirteen states, from any control of these Indians or of intercourse with them. "The Indian nations," said Chief Justice Marshall (p. 559), referring to the time of the framing of the Constitution, "had always been considered as distinct, independent, political communities, retaining their original natural rights as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer. . . ." There is much more discussion of the politico-legal capacity of Indian tribes in both Marshall's and McLean's long opinions. McLean (concurring) remarks that if Indians become " incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend to them the ægis of its laws. Under such circumstances the agency of the general government, of necessity, must cease. But if it shall be the policy of the government to withdraw its protection from the Indians who reside within the limits of the respective states, and who not only claim the right of self-government but have uniformly exercised it, the laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. . . . These laws throw a shield over the Cherokee Nation. . . . By the enactments of the State of Georgia, this shield is broken in pieces—the infant institutions of the Cherokees are abolished, and their laws annulled."

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[1] 118 U.S. 375, 384 (1886).

[2] 5 Peters 1 (1831).

[3] 6 Pet. 515.

Thus was the federal control of Indians first judicially announced. The judgment in the Worcester case was actually not carried into effect. Georgia defied the Supreme Court. But the cause of the conflict was soon removed; a new treaty was made with the Cherokees, who received an indemnity for past wrongs and for removing across the Mississippi to territory now within Oklahoma. A considerable number of individuals, however, broke off from the tribe and remained in the east, eventually establishing in the adjoining state of North Carolina a new tribal government on a reservation granted to them as a state corporation by that State.

Because of their peculiar history, these Eastern Cherokees, like the indigenous Maine and New York tribal Indians, actually are not within the sole control of the national government as are other tribes. The Supreme Court, to be sure, has never passed upon the question, but has refused to use opportunities offered to review decisions sustaining state regulations. Within the last year it denied a petition for review[1] in a case in which the intermediate federal court had said, " The members of the band by separation from the original tribe have become subject to the laws of the State of North Carolina." This remark is not of great authority, however, for it was only dictum, the decision being, on the contrary, that since Congress could lawfully extend to them guardianship and protection, it was lawful for it to accept from the Indian tribal corporation a conveyance of its lands to the United States, and to exempt these lands from state taxation.[2] In *U.S. ex. rel. Kennedy* v. *Tyler*,[3] from which quotation will be made hereafter, the Supreme Court raised but did not decide a question of the authority of New York State to legislate regarding its tribal Indians.

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[1] 52 Sup. Ct. 312.

[2] *U.S.* v. *Wright*, 53 F. (2d) 301 (1931).

[3] 269 U.S. 136 (1925).

After the Georgia cases of the 1830's, the Supreme Court's support of exclusive national supremacy over Indian tribes again finds notable expression in the case of the Kansas Indians,[1] where the Court said: "As long as the United States recognizes their tribal character, they are under the protection of treaties and laws of Congress, and their property is withdrawn from the operation of State laws" and hence not taxable by the State even though owned in fee by individual Indians.

Indian Treaties.—Though the inability of these "domestic dependent nations" to enter into treaties with foreign states was repeatedly declared, the U.S. continued to deal with them by treaty, sometimes prefaced by war, till Congress in 1871 enacted a statute prohibiting further Indian treaties. The federal power over Indians having become firmly settled, Congress thus struck down or admitted to be false the chief constitutional basis of that power.[2]

This of course did not terminate the existence of Indian tribes as entities. Though neither international law nor American constitutional law counted them states, and though they have rarely taken on the form of corporations authorized by municipal authority, they still remained legal units having social, economic and political significance. One of the most interesting cases involving substantial recognition of tribal contract rights was decided by an international tribunal in 1926 when Great Britain (Canada) on behalf of the Canadian Cayugas obtained an award from the United States of annuities originally promised by New York State to the Cayuga tribe, when it was wholly resident in that state. The decision is reprinted in full in 20 A. J. I. L. 574. Despite the tribunal's insistence that "the Cayuga Nation has no international status," "is not a unit in international law," and existed, when the treaty between New York and the Cayuga Nation was made, "as a legal unit only by New York law"; nevertheless the Cayuga claim was held to be properly asserted by Canada to the extent that the tribe became resident there. No yardstick is indicated to measure the share that Canada was entitled to, but the claim is treated as a group claim of those who, as an organized fraction of the cloven tribe, left New York in order to settle in Canada, although there, under British law, they ceased to retain collective existence. Though these Cayugas who moved to Canada were treated there as individuals, not as a tribe, still their situation was unlike that of individual Cayugas who detached themselves from tribal allegiance, for such individuals would cease to have the benefit of a treaty right which was tribal in character.

In passing I might mention that shortly before the American Civil War, Great Britain was considering suit against the state of New York on this claim in the U.S. Supreme Court.[3]

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[1] 5 Wallace (72 U.S.) 737, 757 (1866).

[2] It is interesting to note that Canada at about the same date gave up dealing with its Indians by treaty. The treaty of 1873 between the Dominion and the Salteaux tribe of Ojibways was apparently the last.

[3] See Scott, *Jud. Settlement*, pp. 111–12.

The cessation of treaty making with Indians does not lessen the obligation of treaties already made. This was expressly stated in the Act of 1871. If the tribe were extinguished as a political entity, treaty rights of a promissory character could hardly be asserted by the persons who had been members of the now vanished nations, for the extinction of a state destroys treaty rights and obligations of an executory nature. But the tribes continue to exist. The old treaties have not ceased to be recognized by the courts as having the same validity in municipal law as have international treaties.

It is a constitutional rule in the United States that statutes and treaties are of equal rank ; hence *posterior in tempore, potior in jure.*

This is certainly the rule in private litigation, *Lone Wolf* v. *Hitchcock*[1] (a case, by the way, which lays down an extreme view of Congressional capacity to disregard treaties relating to tribal lands). Though the Supreme Court has frequently adjudged cases between states of the union and between the United States and states of the union, and though it has competence to decide international cases, no case between a foreign state and the United States (or any state thereof) has yet been decided by it.[2] It is, however, conceivable that in a case brought by or against foreign states, the Supreme Court would deem itself a court of international law, just as the Court of Claims has in several cases of an international character, most recently in *Royal Holland Lloyd* v. *U.S.*[3] But Indian tribes, not constituting either municipal or international states, as was for ever decided in Cherokee Nation against Georgia, have no original access to the Supreme Court. Nor have they or any legal person any means of suing the United States without its consent. In several cases where the United States has consented to be sued by Indian tribes in the Court of Claims, the decisions intimate that treaty rights of Indians prevail over subsequent federal legislation, perhaps by reason of the terms in which Congress has referred these Indian tribal claims for consideration to that court.

Whether in a case reaching an American court without special terms of reference, such a court would ever prefer international to municipal law must remain a speculation till such a case arises. Though the Constitution exposes the several states of the union to suit by a foreign state in the Supreme Court, yet no foreign claims against such a municipal state has yet been brought to judgment, in part perhaps for the very reason that there is this uncertainty whether the court would deem itself bound by municipal or by international law in such litigation.

It is, however, entirely clear that in all private litigation the law of Congress subsequent to a treaty overrules the treaty in the view of American courts. But equally clearly the enactments of states have no validity as against treaties, just as they have none as against valid national legislation.

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[1] 187 U.S. 553 (1903).

[2] See Scott, *Judicial Settlement of Controversies between States of the American Union*, pp. 109–112.

[3] 73 Ct. of Cls. 722 (1932).

It is true, of course, that when Congress admits a new state to the union, it surrenders to that state all legislative authority to be exercised within its boundaries, except such power as Congress has with relation to *all* the states. Hence the state can thereafter supersede federal legislation by state legislation in all the fields of *state* activity. But since the treaty-making power is an exclusively federal power, the provisions of treaties remain inviolable by the newly created state. Are Indian treaties like other treaties in this respect? At first sight it might not seem so. In the first place, treaties between New York State and its Indian tribes entered into many years after the establishment of the United States Constitution[1] have been accepted as law (though the United States Supreme Court has never passed on this) on the ground that New York could still make Indian treaties despite the prohibition of treaty making by the states contained in the Constitution, because they are not treaties in the constitutional sense. Then, it can hardly be denied that treaties between the United States and Indian tribes have been so *construed* as not to conflict with or invalidate state legislation with respect to Indians when off their reservations. Thus state game and fish laws apply to Indians outside their reservations in areas where earlier treaties had recognized the Indians' freedom to angle and hunt. In *Ward* v. *Race Horse*,[2] the Supreme Court so held. But the holding was not on the ground that an Indian treaty was not a treaty; it was purely a matter of interpretation—the liberty granted by the treaty to take game upon the unoccupied land of the United States was held to be subject to the right of the United States to dispose of this land—both of its title to the land and its sovereignty over the land—hence "temporary and precarious," as the court said, lasting only so long as the land remained under federal sovereignty as well as in federal ownership, though the treaty read, "so long as game shall be found thereon." After the creation of the State of Wyoming to include the territory referred to in the treaty, title to the unoccupied land still remained in the United States. The Indians claimed the right to hunt there without hindrance by the newly created State of Wyoming. But the court upheld the state game law on the ground that the act of Congress admitting the new state was in itself irreconcilable with exemption from such regulation by the newly created sovereign. In close accord is a series of Washington cases culminating in *Washington* v. *Wallahee*,[3] enforcing statutes contrary to the Yakimas' apparent treaty rights effective beyond the bounds of their reservation. Indeed in this decision the court asserted, though incorrectly, that earlier cases had held "that the Yakima tribe was not an independent nation nor a sovereign entity of any kind." In all these cases, one or more judges have dissented on the ground that the court was misconstruing plain treaty provisions, and by none of the judges is it averred that the state has power to supersede Indian treaty rights.

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[1] See *Seneca Nation* v. *Christie*, 126 N.Y. 122 (1891).

[2] 163 U.S. 504 (1896).

[3] 143 Wash. 117 (1927).

Another way of supporting state game laws in apparent conflict with Indian treaties is to reason that the treaties give the Indians a servitude, a profit *à prendre*, in the land owned by the United States, but that its enjoyment is subject to regulation by the sovereign (that is, the state when a state is created) just as a hunting or fishing privilege granted by any landowner is subject to regulation by the sovereign state. Such a view is first hinted in *U.S.* v. *Winans*,[1] is relied on in *Kennedy* v. *Becker*,[2] involving a New York State Indian treaty; and is fully adopted in *People* v. *Chosa*,[3] as well as in other recent cases. The treaty is in this respect treated as a conveyance of a right in land owned by the State of New York or the United States. But, though the theory is plausible, the treaty-making state having been both owner and sovereign when the treaties were made, such a legal theory, as the court admits in *Kennedy* v. *Becker*, could hardly have been within the view of the negotiators—at least of the Indian negotiators.

Indian treaties, then, are given, at least in theory, the same honour as other treaties. Treaty enforcement continues though treaty making is past history.

Citizenship.—The law relating to the citizenship of Indians also throws light on their legal status. Soon after the United States ceased to deal with Indian tribes by treaty, as if they were foreign nations, it began conferring citizenship upon tribal Indians and thus enabled them to participate, generally speaking, in the political life of the states and the nation.

The Act of 1924 conferring citizenship on the 125,000 Indians who had not already obtained it by earlier individual or tribal naturalization, as well as all the earlier laws relating to naturalization of Indians, would have been needless if Indians born within the United States had not been citizens of distinct political units. The famous Fourteenth Amendment to the United States Constitution begins : " All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens." Yet, like children born to foreign diplomats in the United States, Indians were deemed by the courts not to be citizens of the United States (though undoubtedly its nationals in the international law sense) but rather members of domestic dependent nations.[4]

It was maintained for a while that the grant of citizenship to an Indian would make him, legally, like other citizens of the white, black or yellow race. When only individual Indians by process of individual naturalization became citizens, as it usually meant separation from tribal life, this was a convenient rule. Indeed the first collective naturalization law (1887) applied only to Indians who had " adopted the way of civilized life." But this rule, whatever its original merit, unfortunately found express recognition in a carefully considered Supreme Court opinion as late as 1905,[1] where the court concluded that Congress could no longer regulate the sale of liquor to Indians who were citizens. "When the United States grants the privilege of citizenship to an Indian," said the court (p. 509), ". . . it places him outside the reach of police regulations on the part of Congress. . . . This emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

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[1] 198 U.S. 371 (1905). [2] 241 U.S. 556 (1916). [3] 252 Mich. 154 (1930).

[4] *Elk* v. *Wilkins*, 112 U.S. 94, 5 S. Ct. 41 (1884).

But time has altered this view, which was an extreme assertion of the then prevailing legislative policy of Indian assimilation. Thus in *U.S.* v. *Sandoval*,[2] the court said: "Citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws [here again liquor laws] for the benefit and protection of tribal Indians as a dependent people." And in *U.S.* v. *Nice*,[3] three years later, the Heff case was expressly overruled, and there was further said (p. 598): "Citizenship is not incompatible with tribal existence or continued guardianship" exercised by means of "Congressional regulations" [here again liquor laws—several years before the ill-fated Prohibition Amendment took effect].

Who is an Indian.—When then does an Indian become subject to state laws if not upon acquiring citizenship? When does he cease to be within the control of Congress as an Indian? Conceivably though he become subject to duties to the state government, he may still remain subject to duties as an Indian to the national government. Clearly, so far as the acquisition of legal rights is concerned, there is an overlapping of authority. For example, certain medical or educational services of the state may become available of legal right to Indians by virtue of state legislation at the same time that under national law he may have a right to similar services from Washington.[4] But we may accept as the only workable theory that federal control is exclusive of state control. Any other system would lead to even worse conflicts between state and federal or state and tribal authority than we suffer from now.

Neither statute nor decision has laid down any clear and general definition of an Indian. One cannot even say with assurance whether any racial test may be used—whether a person of pure Indian ancestry may nevertheless lay off his Indian quality totally by giving up Indian ways of living; whether a person of pure white inheritance who lives the life of an Indian may by adoption into an Indian tribe acquire the legal quality of Indian.

In the notorious Dred Scott case of 1857, where the Supreme Court attempted to deal with the political issue of slavery, which soon after brought on the war between the states, Chief Justice Taney indulged in the dictum that unlike the negroes "the people who compose these Indian political communities have always been treated as foreigners not living under our government." But, said he, "if an Indian should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."[1] As in the language quoted from the later Nice case, the answer to the question of when federal control terminates is here stated in terms of severance of tribal relations in the social or political sense. This, I think, represents the trend of the decisions except when federal legislation has now and again laid down some other standard.[2]

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[1] *In Matter of Heff*, 197 U.S. 488.

[2] 231 U.S. 38, 48, in 1913.

[3] 241 U.S. 591.

[4] And the contrary sometimes occurs: neither the national nor the local public authority assumes responsibility for some service, such as provisioning in time of crop failure or flood or unemployment.

The Indian who remains in the tribal social unit is governed by its law and the statutes of Congress relating to Indians, not by the general law applying in the state containing the reservation. But an Indian who has severed himself from the tribe is probably governed by the general law, like one not of Indian race, even when he chances to be on the reservation of the tribe to which he once belonged.[3] This seems to be the case also where Indians no longer tribally organized live on national land and subject to some national supervision, a situation that exists principally in California, and which has been carefully described by Professor Goodrich in a recent article, "The Legal Status of the California Indians," *Calif. L. Rev.* 83 and 157 (1926).

A very competent investigator of Indian legal status, who prepared the legal section of the elaborate report entitled "The Problem of Indian Administration," submitted in 1928 by the Institute of Government Research to the Secretary of the Interior, my Wisconsin colleague, Professor Ray A. Brown, writing on "The Indian Problem and the Law,"[4] disagrees with this criterion of Indianhood, however, and says that though "there are numerous state decisions which have made the status of Indian turn on whether the individual concerned has severed his tribal relations," yet "there is no federal authority for this view." At least there is enough language in federal adjudications to constitute some authority for it. Professor Brown in the passage quoted was apparently thinking only of the criminal law. In that field the statutes are fairly clear. A section of the federal statute first enacted in 1887, which now is an ingredient of s. 349 of title 25 of the U.S. Code, says that reservation Indians when and only when they obtain a title to their land in fee "shall have the benefit of and be subject to the laws, both civil and criminal, of the state." This, it seems to me, really makes the allotted land, for which the United

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[1] *Scott* v. *Sanford*, 19 Howard (60 U.S.) 393, 404.

[2] Compare *Plummer* v. *Hubbard*, 207 N.Y. App. Div. 29 (1923), construing the so-called Indian Law enacted by New York State as exempting from contract liability only those Indians who lived as members of a tribe on a reservation.

[3] Compare the recent Montana Supreme Court opinion of *State* v. *Phelps*, 19 P. (2d) 319, 320 (1933).

[4] 39 Yale L.J. 307 (1930).

States has issued its patent or title deed, no longer a part of the so-called "Indian country" in which alone the federal criminal statutes relating peculiarly to Indians apply. But it lays down no test of *who* is subject to the federal criminal law governing Indians. Though the language speaks of the *Indians*, its effect is to subject the *land* and *acts* done on the land to the state laws.[1] Nor have the courts given this section, and it is hard to see how they could give it, personal application. How could an allottee be subject to a personal law different from that applying to other members of his own household?

Conflict of Jurisdiction over Eastern Reservation Indians.—And such a test would be utterly incongruous in New York where the title to the Indian lands is not derived from the United States. Yet when Congress legislates respecting these New York reservation Indians, its law prevails (though it has neither treaties nor land title to stand on).[2] Where Congress is silent, the New York statutes concerning Indians are deemed effective, though the United States Supreme Court has never yet pronounced on their validity. In *U.S. ex. rel. Kennedy* v. *Tyler*,[3] the latest case—one concerning a deceased Indian's estate—in which the Supreme Court approached the question, it said:

> Whether the state judicial power extends to controversies in respect of the succession to Indian lands within the boundaries of the state, whether the Peacemakers' [Indian] court in the exercise of its jurisdiction is subject to the jurisdiction of the state Supreme Court, whether the subject-matter of these controversies and proceedings was one exclusively within the control of the national government beyond the authority of the state, are all questions which . . . it is peculiarly appropriate should in the first instance be left to be dealt with by the courts of the state. . . . The power of the highest state court in respect to such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him.

Here we have the highest federal court applying the international law doctrine of "exhaustion of local remedies," that is, insisting on a decision by the New York state courts as to the authority of the Indian tribal court before the federal tribunal is called upon to act—a doctrine, by the way, which the Supreme Court is more and more frequently applying where the construction of a state statute, not previously construed by the highest state court, is involved in the determination of a case.

Indian Autonomy.—In New York, as Chief Judge Cuthbert Pound of the New York Court of Appeals has expressed it, "Three sovereignties are thus contending for jurisdiction over the Indians—the Indian nations, the United States and the State of New York—none of which exercises such jurisdiction in a full sense." In most other states, however, there is no state authority over, or responsibility for, tribal Indians on a reservation. This gives to many Indian tribes a large measure of continuing autonomy, for the federal statutes are only a fragment of law, principally providing some educational, hygienic and economic assistance, regulating land ownership, and punishing certain crimes committed by or upon Indians on a reservation. Where these statutes do not reach, Indian custom is the only law. As a matter of convenience, the regular courts (white men's courts) tacitly assume that the general law of the community is the law in civil cases between Indians; but these courts will apply Indian custom whenever it is proved.

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[1] Cf. 25 U.S.C. § 348, applying state laws of descent to allotted land even before the allottee has an unconditional fee title.

[2] *People ex. rel. Cusick* v. *Daly*, 212 N.Y. 183 (1914).

[3] 269 U.S. 13, 17 (1925).

Nearly half a century ago the Indians were called by the legal historian, the late Professor James Bradley Thayer of Harvard, "a people without law," and Chief Judge Pound has more recently called the New York Indians "nationals without a nation." When these distinguished jurists are baffled, I hesitate to be categorical as to the analytically correct solution of numerous legal questions that do or may arise concerning Indians.

Besides the scores of Indian treaties still in force, there is special federal legislation for half a hundred different tribes and groups of tribes. Especially the land tenure legislation is bewildering. Indeed the federal statutes are so confused that they paralyze administrative action.[1]

But the present unsatisfactory state of the law is largely due to an underlying conflict of policy—whether the Indians should be subjected to the social and economic system of the whites or encouraged to maintain their distinct institutions.[2] Until a consistent policy is agreed upon by all interested parties, no substantial simplification of the Indian legal situation can occur.

In the 1933 report of the Board of Indian Commissioners, just mentioned, after a reference to the tangled muddle of Acts and regulations and treaty obligations which must be simplified and codified before progress in Indian administration can be made, the majority of the board recommends a policy of decentralization of control, saying:

> We believe the extension over the Indian reservations of the sanitary and criminal laws of the several states is required and demanded both for the protection of society and for the welfare of the Indians. . . . Years ago when the Indians were isolated and living in a primitive fashion it was proper enough to let them handle their own offenders after their own customs, but now most Indians are living as white men live and they are perfectly able to comprehend and obey the laws. . . . Make the laws of the state enforceable on an Indian reservation just as they are everywhere else, giving if need be the Secretary of the Interior authority to exempt, for the time being, the jurisdictions where he may find reason to believe that Indian life is still too primitive to make such application justifiable.

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[1] See, most recently, the 1933 report of the Board of Indian Commissioners, an advisory board, composed of men of distinction and with varied points of contact with Indian life, appointed for long terms by the President, which has served for over fifty years as an honourable counsellor and critic of federal Indian administration.

[2] See Goodrich, *The Legal Status of the California Indians*, 14 Cal. L. Rev. 83 and 157, esp. 181–7 (1926).

But whether this course will be followed is highly doubtful. The board, whose last report I have quoted, has been abolished, nominally as a measure of economy, but in part probably because the present Commissioner of Indian Affairs holds very different views regarding Indian autonomy. There is complete agreement only to this extent, that where tribal organization is strong, as among the Navaho and pueblo tribes of the south-west, sufficient internal order and justice are afforded by tribal law; while elsewhere, the present system tends to lawlessness destructive to the Indians themselves and menacing to white settlers near the reservations.

Congress has sometimes expressly extended state laws to govern Indian tribes,[1] at other times laid down some rules of its own, as we have seen. But where no act of Congress intervenes, the Indian tribal custom is effective. Thus in *Jones* v. *Meehan*,[2] descent of land owned in fee by a tribal Indian was held to run by the Chippewa law of primogeniture and not by the law of descent of the state within which the land lay. And similarly in *Woodin* v. *Seeley*,[3] an inferior New York court recently held that a Seneca Indian's land descended according to the Seneca law of maternal inheritance.

The law governing marriage is the most striking survival of Indian law. The Indian custom is expressly recognized by federal statute in determining legitimacy,[4] and without legislation by all courts in passing upon the validity of marriage.[5] While marriage by mutual consent and without licence or act of any state or church officer (so-called common law marriage) is not permitted in at least half the states of the union, such an Indian marriage, if in conformity with tribal custom, is everywhere valid. And so are informal Indian divorces, though divorce without court decree is unknown in the United States outside of Indian custom. Thus Indian custom was recognized as law in *Coker* v. *Moore*,[6] where a Creek had many years before informally married and divorced a woman and then married her daughter (by a previous marriage) who had been a member of his household during his first marriage. Examples like this perhaps explain why Congress thereafter (in 1890) subjected the Creeks and the four other "civilized tribes" of Oklahoma to the state law. But tribal law still governs many tribes. And in these cases even polygamous marriages, permitted by Indian law, are valid.[7] The marital rights of polygamy, however, could probably not be exercised off the reservation.

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[1] See *Jefferson* v. *Fink*, 247 U.S. 288 (1918).

[2] 175 U.S. 1 (1899).

[3] 252 N.Y. Supp. 818 (1931).

[4] 25 U.S.C. § 371.

[5] Some courts have, however, refused to grant divorces to persons married only according to Indian custom. These refusals seem incorrect, for the same reason that the British Court of Appeal reversed the Probate Division which had refused to entertain a suit for divorce between persons married under the Soviet law. *Nachimson* v. *Nachimson*, [1930] P. 217.

[6] 121 Okla. 219 (1926).

[7] See note 74 L.R.A. 1538.

Summary of Legal Situation of Indians.—With full recognition of its uncertainties, I would describe the present legal situation of tribal Indians in these terms :

1. After some doubt it is now clear that the state criminal law cannot govern the acts of a tribal Indian on his reservation. This seems to be true even in New York.[1] Crimes committed on a reservation upon non-Indians by Indians or upon Indians by non-Indians have long been outside the cognizance of the states.[2] But the earlier federal statutes punishing such crimes and thereby impliedly excluding state power, did not apply " to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe."[3] Such a restriction of course does not prevent the punishment of Indians (not punished by the tribal law) for crimes committed even on a reservation if no individual is the victim.[4] Moreover since 1885 eight major crimes committed by one Indian on another Indian have been made punishable by national law.[5] And this legislation impliedly excludes the state from punishing Indians for any acts done on the reservation.[6] Lesser crimes are thus left entirely to Indian law, to be noticed or ignored as the tribe (or its judicial agency) may choose.

2. In civil matters the lacunæ of federal legislation are so enormous that the general law, though theoretically inapplicable, practically fills the gaps, subject to proof of a positive Indian custom that varies the law. Thus federal legislation and, in default thereof, Indian custom rule ; but state law practically covers much of the ground.

3. As for acts done off the reservations the general law governs Indians like non-Indians ; though in civil matters positive Indian custom might be respected in transactions between tribal Indians who are within the custom (*i.e.* members of the same tribe).

As most reported litigation involving Indians relates to crimes or to tribal property rights, the civil rights of individual Indians, except in the field of marital relations, are not supported by a sufficient number of decisions to give precision to the legal picture.

Tribunals administering Law to Indians.—A word should be said about the tribunals that try Indian litigation. These are of three sorts : (1) federal agencies other than judicial ; (2) the regular federal and state courts ; (3) Indian courts.

(1) (*a*) After vacillation Congress has vested the Secretary of the Interior with exclusive authority to make distribution of certain real

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[1] *People* v. *Daly, supra.*

[2] *Donnelly* v. *U.S.*, 228 U.S. 243 (1913).

[3] 25 U.S.C. § 218.

[4] *Bailey* v. *U.S.*, 47 F. (2d) 702 (1931) (smuggling from Mexico on to a frontier Indian reservation).

[5] 18 U.S.C. § 548.

[6] *State* v. *Rufus*, 205 Wis. 317 (1931).

estate of individual deceased Indians.[1] (*b*) Without express legislation, the courts have concluded that tribal property rights asserted against the United States are beyond their cognizance. Suit against the United States is impossible except where Congress has expressly authorized it[2]; but the doctrine now adverted to extends to cases where the United States is not the defendant. Thus in *Cherokee Nation* v. *Hitchcock*[3] the Supreme Court said:

> The power existed in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature [no further elucidation is offered by the court], the manner of its exercise is a question within the province of the legislative branch to determine and is not one for the courts.

The case is extreme, for Congress, after giving the tribe title in fee to its lands, had authorized the Secretary of the Interior to lease them for exploitation of minerals. The doctrine was not applied in a later case where the Indian title was derived not from the United States but from Spain,[4] but it may still be law in the more usual situation.

(2) With these exceptions any case by or against an Indian may be tried by the regular state and federal courts.[5] For Indians are not extraterritorial but only subject to a special rule of substantive law. As for crimes committed by tribal Indians on a reservation, the only prosecution in regular courts is in federal courts, for it is the accepted rule (though not a constitutional necessity) that violations of criminal law are tried only in the courts of the sovereignty ordaining the law.

(3) Offences other than those specifically designated by federal statute therefore come only before Indian courts, for they are offences only against the Indian sovereignty.[6] In some cases these courts are really maintained by the Indians, as the Peacemakers' Court of New York Senecas. In others the judges (two Indians) are appointed by the federal Indian service. A court of the latter kind, usually called a reservation court of Indian offences, administers a law, chiefly criminal, consisting of a hodge-podge of Indian custom and other ingredients. These courts may even be described as extra-legal, says Professor Brown, for Congress has never gone farther in recognizing them than to authorize a small salary for their judges. They now exist on some thirty reservations, in conformity with orders of the Secretary of the Interior. They seem to me theoretically to derive their authority from the tribe, rather than from

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[1] *Hallowell* v. *Commons*, 239 U.S. 506 (1916). 25 U.S.C. § 371.

[2] Congress lately has authorized the Court of Claims to decide several tribal claim cases.

[3] 187 U.S. 294, 308 (1903).

[4] *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919).

[5] *Felix* v. *Patrick*, 145 U.S. 317, 332 (1892).

[6] Of course governmental functions are not sharply distinguished by a primitive political society. The tribal council, primarily a legislative body, may decide matters which we would think judicial. But definitely judicial functions are exercised by Indian judges on most reservations.

Washington, though a lower federal court once explained them as part of federal guardianship.[1] While in theory perhaps Indian courts, in fact the courts of Indian offences are controlled by the white superintendent of the reservation and are used as an administrative agency, their action often being extremely informal and their decisions not accessible to the public.

The genuine tribal courts are sometimes more important. In matter of *Patterson* v. *Seneca Nation*,[2] the Court of Appeals of New York was asked to pass upon the authority of a Seneca Peacemakers' Court. This case was decided shortly after the United States Supreme Court had refused to consider the merits of a like question in *Kennedy* v. *Tyler*, previously quoted.

Patterson claimed to be a member of the Seneca Nation, but the Peacemakers' Court rejected his claim. He then applied to the New York courts to intervene and compel the Peacemakers' Court to recognize him. The Constitution of the Seneca Nation, which had been " ratified and confirmed " by the legislature of New York, created " Peacemakers' courts " to have " exclusive jurisdiction in all civil cases arising between individual Indians residing on said reservations." Despite a statute (called the Indian Law) enacted by the legislature which defined the jurisdiction of the Peacemakers' courts more narrowly, the Court of Appeals held that since the Seneca court was " the creation not of the state but of the Indian Constitution," its jurisdiction was not limited by this later statute, " which does not deny comprehensive jurisdiction " but only " fails to use terms apparently bestowing it." The Indians themselves are thus recognized as creating the jurisdiction, with the consent of New York.

The refusal of the state court to interfere was rested also on a second basis : that tribal membership " is primarily not a judicial but a political question," so that (whether among the Senecas the council of the tribe or the Peacemakers' courts settle the question) it was beyond the judicial control of the regular New York courts, at least in the absence of an express statute empowering them. The usual view is probably otherwise. In the *Cherokee Intermarriage Cases*,[3] for instance, the United States Supreme Court carefully construed the Cherokee Constitution and the pertinent laws of Congress to determine who were entitled to be enrolled as members of the tribe so as to participate in a distribution of tribal lands and funds. Thus the decision of the Cherokee Council was not treated as political or as entitled to conclusive effect by the federal courts.

The tribal basis of authority of the Peacemakers' Court was recently recognized also by an inferior federal court, when the judge said in an opinion :

> Whether or not the Indian Law [statutes relating to Indians] of the State of New York is of any force or effect would not necessarily be conclusive here.

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[1] *U.S.* v. *Clapox*, 35 Fed. 575 (1888).

[2] 245 N.Y. 433 (1927).

[3] 203 U.S. 76 (1908).

The charter or constitution of the Seneca Indians is sufficient to support the jurisdiction [of the Indian court].

The case just quoted, *Rice* v. *Maybee*,[1] applies the well-settled rule that the decision of such an Indian court is *res judicata*. But the judge remarks :

> While this court cannot disturb the decision of the Peacemakers' court, it cannot refrain from pointing attention to the fact that the findings of the Peacemakers show their utter incapacity to determine important property rights, nor refrain from stating its accord with the frequent statement of the courts that the confusion on the question of federal and state jurisdiction is most detrimental to these tribes.

Conclusion.—The court here is speaking of the New York Indians, but the observation may be given broader application. All the tribal Indians are in so confused a legal situation that if certainty is a necessary characteristic of law, we may still describe them, as did Professor Thayer, as " a people without law." Their situation is an example of gradual, very gradual, dissolution of a primitive legal order by submergence in a more powerful and complex legal order. The law has long been uncertain, and its future is uncertain chiefly because the fundamental question of whether destruction of tribal life is to be encouraged is undecided. Clearly, Indian legal autonomy is surviving as long as, sometimes longer than, distinctive Indian habits of life survive. Until a tribe has disintegrated as a social organism or its members have become culturally undistinguishable from the surrounding community, the American law recognizes it as a political entity maintaining a special legal order. But those rules of law that are imposed upon it and its members lack unity, for there is no sure aim either to preserve tribal culture or, on the contrary, to melt it down in the great cauldron of American life.

[EDITORIAL NOTE.—Our learned contributor's remark that no claim made in the Supreme Court by a foreign State against a municipal State has yet been brought to judgment gives a special point to the announcement recently made in the English papers to the effect that the Principality of Monaco has served notice on the State of Mississippi that, as owner of Mississippi bonds which have been in default for over 90 years, it will apply for leave to bring an action in the Supreme Court of the United States for repayment of the principal and interest.]

[1] 2 F. Supp. 669 (1933).

DELEGATED LEGISLATION IN ENGLAND AS SEEN FROM ABROAD.

[*Contributed by* CECIL T. CARR, ESQ., D.C.L.]

Two books [1] lately published in America show the interest taken abroad in the problem of the proper relation of our government departments to Parliament. Both books, as the writers explain, were completed in outline before the Donoughmore Committee presented its report in 1932. Both of them manage nevertheless to incorporate and comment on the findings and recommendations of the Committee. Both of them concentrate rather on the rule-making than on the quasi-judicial functions of departments. Both of them are written with intimate knowledge of our statutes and our Parliamentary debates and with a happy avoidance of political emphasis.

What then do these two observers make of our problem ? A foreigner's curiosity is evidently piqued by the spectacle of an omnipotent Parliament doing something which is called unconstitutional, prodigally distributing legislative power like a Christmas-minded householder at his front door while the barking of the watch-dogs tries to warn him that the recipients of his largesse are really burglars. In his *Parliamentary Opinion of Delegated Legislation* Dr. Chih-mai Chen asked himself what criticisms and defences have been made by Lords or Commons when Bills delegating legislative authority have been under discussion. Observing that the propriety of such delegation has never been a party issue, he flatteringly adds that the debates on the subject disclose genuine and candid convictions. His instances show each side in turn branding the practice as unconstitutional when endeavouring to defeat or delay the proposals of its opponents. Ministers accused of attempting despotism and dictatorship have been rhetorically compared, it seems, to Julius Cæsar, Judge Jeffreys, Kings Louis XIV, XV and XVI, Napoleon, the Czar, the Shah of Persia, the Sultan of Turkey, Mussolini and Primo de Rivera. Sir Frederick Pollock remarked long ago that the zeal of the accusers is naturally tempered by the knowledge that they themselves have done the same thing in the past and will want to do it again when they come back to power.[1] The conclusion of Dr. Chen's admirably complete and lucid study is the same. The critics of to-day are the champions of to-morrow and *vice versa.* " The watch-dogs of the constitution are found in the rank and file of every party. Their enthusiasm often depends upon the side of the gangway where they chance to sit. The moment the whips crack, desire to defend the constitution yields to the still stronger desire to remain a ' loyal son.' Defender or no defender, members walk into the lobby to which they belong."

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[1] *Parliamentary Opinion of Delegated Legislation*. By Chih-mai Chen, Ph.D. (Columbia Univ. Press, 1933. London : P. S. King & Son). Pp. 149. 11*s*. 6*d*.

The Parliamentary Powers of English Government Departments (Harvard Studies in Administrative Law, No. 4). By John Willis. (Harvard Univ. Press, Cambridge, Massachusetts. London : Humphrey Milford, Oxford Univ. Press.) Pp. 214. 16*s*. 6*d*. Mr. Willis, having gone from Oxford to Harvard with a Commonwealth Fund Fellowship, has observed us from abroad but is not to be described as a foreigner.

Lowell and others long ago recorded the fact that an English or American statute is overburdened with detail and tries to provide in advance for all contingencies. Dicey, whose name and teachings so often inspire the critics of departments, thought we might improve the substance no less than the form of our law if, adopting the continental method, we would embody general principles in Acts of Parliament and allow our executive government to work out the detailed application " by means of decrees, ordinances or proclamations having the force of law." Dr. Chen, following perhaps a hint given by Maitland,[2] considers that the legislative monopoly of Parliament began to be relaxed a century ago when the Reform Bill was passed.

Historical Survey.—He begins his historical summary therefore at the year 1832. This is a convenient date even if it tends to underestimate the mass of natural or *de facto* delegated legislation visible in mediæval England. The ordinances of the gilds, for instance, were a familiar element of our early vocational life, the forerunner of the modern powers of regulation delegated by Parliament to solicitors, doctors, dentists, veterinary surgeons, chemists and architects. The making of by-laws began to be a commonplace of municipal charters in the fourteenth century. This was delegation under the prerogative, it is true, rather than delegation by Parliament, but the principle and the effect were the same as if it had been mass-production delegation under the Municipal Corporations Act. As we look round to-day, we see how widely the power to make by-laws has spread; if the word's original meaning was township-law,[3] we have a hint of the influence of municipal autonomy on the structure of English institutions. In Elizabethan times the power to make " statutes, acts, ordinances and rules " is granted to chartered companies like the Mines Royal.[4] Indeed, in that age of corporate organization, the rules and restrictions of corporate membership were visible everywhere. Dr. Chen, however, is entitled to tell his story of the Parliamentary delegation of legislative authority according to his own excellent plan. He divides it into three stages. The first, from 1832 to 1906, he describes as a period of individualism and *laissez-faire*. Those to whom delegated legislation is a recent discovery are shown Lord Althorp in 1832 defending the practice on the now well-accepted ground of extemporization to meet emergencies. He is in charge of a Bill for the prevention of cholera, and he claims that " the exigency of the case " will justify it in the eyes of all rational men. Sir Robert Peel agrees that it is better to give a discretionary power to the Privy Council (then the only body suitable, though now, amid the multiplication of departments, many of its functions have gradually been stolen away) than for Parliament to attempt to define the precise nature of the measures to be adopted. Soon afterwards Lord Althorp is using other now familiar arguments in support of delegation. The proposals to confer wide discretion and authority on the new poor law commissioners will, he says, be " subject to the constant control of the Parliament and the executive government." It will help moreover to attain " uniformity of system throughout the country." These words reveal the tendency of the time. They recall the contemporary recital in s. 6 of the Constabulary (Ireland) Act, 1836, where the Lord Lieutenant is allowed to legislate " in order to provide for one uniform system of rules and regulations throughout the whole establishment of police in Ireland." They recall other instances where the local efforts of the justices of the peace were advantageously replaced by centralized control, especially in the domain of public health. The old plan is visible in the statute of James I [1] which authorizes the justices to order plague-infected persons to keep within their doors " for avoiding of further infection," disobedience being punishable as a felony with death ; the justices are empowered to give " directions " to special searchers, watchmen, examiners, keepers and buriers " as unto them for the present necessity shall seem good in their discretions." The new plan is being evolved when the Crown is authorized to make " orders, rules and directions touching quarantine " to prevent infection by plague from the Baltic in 1710.[2] Swift, uniform, expert and therefore central action is wanted. There is no need to multiply the instances ; Dr. Chen's pages are full of them. He tells us too what Mr. Gladstone said about delegated legislation and he cites the comments of Alpheus Todd, once a well-known writer on constitutional topics, who in 1867 was already noting the increasing resort to the practice. To return to Dr. Chen's historical survey, his second period, from 1906 to 1914, is summed up as collectivistic : he is thinking no doubt of such Acts as introduced old age pensions, State insurance and better conditions for shop employees. His third and final period, from 1914 onwards, contains our war-time and post-war improvisations to meet a sequence of emergencies. His story comes down late enough to include the phenomena of delegating powers of taxation as in the temporary Abnormal Importations (Customs Duties) Act of 1931, now replaced by even more remarkable examples.

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[1] *The Genius of the Common Law* (1911), p. 43 : compare the conclusion of the editorial note, L.Q.R. 1915, p. 153.

[2] *Constitutional History of England*, p. 417. For a fuller analysis of the statute-book in this connexion see Sir William Graham-Harrison's memorandum before the Donoughmore Committee, *Minutes of Evidence*, pp. 33–5.

[3] *See* Pollock and Maitland, *History of English Law*, I, p. 625, footnote.

[4] *See Select Charters of Trading Companies* (Selden Society, vol. xxviii), pp. 9, etc. ; the words at p. 13 against repugnancy are noteworthy.

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[1] 1 Jac. 1, c. 31.

[2] 9 Anne, c. 2.

Mr. John Willis, in *The Parliamentary Powers of Government Departments*, makes another important survey of the subject. He marks off four periods instead of three. His first is a slow growth under a paternal government, culminating in the housing legislation of 1909, and the National Insurance Act of 1911. His second he describes as the period of war-time excess from 1914 to 1918, his third a period of "extension" from 1918 to 1928. War-time conditions, he says:

> everywhere gave rise to inflated conceptions of the supposed liberties enjoyed by the British subject before 1914, and when, after the official end of the war in August 1921, good Tories dimly perceived that there was to be no immediate return to the halcyon days of Lord Coke's supremacy, they resolutely applied themselves to denouncing from the Bench, the Lords or the press, the wickedness of "bureaucracy" as a system abhorrent to the principles of the constitution. And this is the real importance of the period—a growing consciousness that governmental organization no longer squared with legal theory.

In a fourth period, beginning in 1929, a period of "regression," he notes a "drive instituted by the legal profession" in an attempt to reassert Parliamentary control. One of his glances backwards at the Case of Ship Money reveals to him a movement which is not a moral issue between Stuart despots and English lovers of liberty but a social issue between legislation (both Parliamentary and judicial) and the common law. The time arrives when the man with a vote "would like to work reasonable hours, be paid a living wage, sleep in a sanitary house." The issue then becomes one of distributive justice "and the courts, guardians of the past, cannot help him." The rights of the community bulk larger than the rights of the individual.

> But then there arises a conflict with the underlying notions of lawyers. Statutes, it is true, have authorized the Crown to take notice of changed conditions and to say "thou shalt" where formerly it was the business of the law to regulate by the magic formula "thou shalt not," but to a lawyer a statute does not speak the living language of the day. Lawyers' ears are attuned to the accents of the forgotten past; new commands are faintly apprehended through the fog of the common law. So comes about the doctrine that statutes are to be interpreted strictly, that there is a presumption in favour of the liberty of the subject—and the result of the doctrine, that it is not thought *mal à propos* to measure modern development by the yardstick of the Case of Proclamations.

The Legal Profession and the Executive.—Mr. Willis's polemics may drive the lawyers into a corner but doubtless they will defend themselves. Even if they cannot deny that they are conservatively-minded, followers of precedent and haters of revolution, even if it is unkindly hinted that in the political arena they fly to the succour of the conquerors and are more concerned with what is than with what ought to be, they will have something to say in mitigation of sentence. As for the judges, what can they do but interpret the statutes according to the accepted rules ? They are not social engineers constructing a new world. Yet, if Mr. Willis's learned and thoughtful pages sometimes betray impatience, it was not unreasonable to wonder why lawyers and judges have felt so keenly the delegation of legislative power. It might have been supposed that bench and bar would have concentrated rather upon resisting the growth of administrative tribunals (the second limb of the Donoughmore Committee's inquiry) ; an encroachment upon the jurisdiction of the courts might have seemed more serious than an extension of legislative machinery. The bitterness of forensic references to departmental legislation is in part explained by the ancient tradition of guarding the law against interference by the executive. Thus in 1870 all the judges unanimously protested against a Bill which proposed to confer on a committee of the Privy Council a power to make or alter the law relating to the constitution, procedure or practice of the High Court. They took strong ground in contending that the more important matters should be settled directly by Parliament itself ; they were content that minor matters should be delegated but it must be to the judges themselves. When bench and bar object to departmental legislation, their feeling springs in part also perhaps from the common law's jealousy of all statutory elaboration. There is a physical weariness in struggling with the overwhelming flood of new written law pouring forth not only from Whitehall but also from the Parliament House itself—the thousands of pages of Public General Statutes added as the sessions go by and the even greater if less conspicuous torrent of Local Acts as well as this snowstorm of bothersome Statutory Rules and Orders. There may be regret too for an old tradition. There was a time when judges subscribed their definite contribution to legislation as in that dawn when a chief justice could say to counsel, "We know the Act for we made it"[1] or in that later noon-day when Mansfield built fresh foundations. Somehow the judicial and the legislative functions have drifted apart ; something has come in between them ; social reforms have contemplated standards in education, housing, sanitation and the like which the interpreters of the common law are not asked to set up or apply. Judge-made law and statute law not only arise by different processes, the judge deciding upon particular facts and unable to shirk answering a question, Parliament making a rule of general application and postponing decision on inconvenient topics ; they also speak different languages. When he comes to compare Lockwood's case with Yaffe's case, Mr. Willis notes the change in the attitude of the bench to the executive between 1894 and 1930. It needs explanation.

Be that as it may, Mr. Willis ought now perhaps to add a fifth period to his analytical survey. In his fourth he showed the legal profession's "drive" gathering momentum, public uneasiness aroused and a demand expressed that principles and standards be declared so that the delegation of law-making power may be confined to prescribed channels. Yet, at the very moment when the " drive " is succeeding, Parliament finds fresh uses for delegated legislation. The Public Works Facilities Act, 1930, showed that the traditional methods of direct Parliamentary enactment were too slow. Next year the National Economy Act offered new openings for Orders in Council, and the Unemployment Insurance (No. 3) Act preferred to leave controversial anomalies to be eliminated by departmental regulations rather than by actual statute.[1] Finally, when the United Kingdom abandoned free trade, the flexible application of an *ad valorem* customs tariff was hardly feasible without the liberal use of Treasury or Board of Trade orders.[2]

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[1] *See* T. F. Plucknett, *Statutes and their Interpretation in the Fourteenth Century*, pp. 50, 184.

Delegated Legislation as an Accepted Fact.—There is now no need to defend the existence or value of delegated legislation. The Donoughmore Committee declared the system to be " both legitimate and constitutionally desirable for certain purposes, within certain limits and under certain safeguards " ; it was " indispensable " and " in fact inevitable." The First Parliamentary Counsel had told the Committee frankly that " it would be impossible to produce the amount and the kind of legislation which Parliament desires to pass and which the people of this country are supposed to want if it became necessary to insert in the Acts of Parliament themselves any considerable portion of what is now left to delegated legislation." [3] Mr. Willis, having no doubt what the Committee must say upon this general issue, regrets the limitations of their terms of reference. They were directed to report what safeguards were desirable or necessary " to secure the constitutional principles of the Sovereignty of Parliament and the Supremacy of Law." This revivalism irritates his logical mind ; this apparent obsession with the Dicey of 1884, not even the Dicey of 1915,[4] makes him contemn the services which academic instruction can render to the study of English law.

> In the Never-Never Land of legal formalism it may well be that phrases coined some fifty years ago by way of incisive generalization for the use of undergraduates should pass as unalterable canons of good government. But to fetter thus the investigations of a committee appointed to probe behind legal fictions, to demand that, whatever the evidence put before them, whatever the social requirements of the time, they should pay homage to a facile generalization, is to determine beforehand both findings and recommendations.

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[1] *See* the annual Summary of Legislation of the United Kingdom in 1931 in this *Journal*, Third Series, vol. xv, pt. ii, p. 1.

[2] *See* the lists of orders under the heading " Customs " in the official Index to the Statutory Rules and Orders in Force, June 30, 1933. And *see* the striking instance of delegation in s. 9 of the Finance Act, 1933 (power to repeal or vary silk duties enactments).

[3] Sir William Graham-Harrison, K.C.B., K.C., *Minutes of Evidence*, p. 35.

[4] *See* the 8th edition of his *Law of the Constitution*, at pp. xxxix, xliii ; and *see Development of Administrative Law in England*, L.Q.R. 1915, p. 148.

Having taken for granted the inevitability of delegated legislation, Mr. Willis devotes himself to the discussion of exceptional types—the provisions which attempt to make statutory rules unchallengeable, the "conclusive evidence" clause and so on. He is also interested in the Private Bill legislation of departments. While the normal methods of making rules and orders have been developed (with or without a direction that the rules and orders be laid before Parliament), a parallel method of legislation by "scheme" made operative by a confirming order [1] has been evolved out of the Private Bill procedure. For this device he predicts a great future.

Rules and Orders which modify Acts.—He has an excellent chapter on rules and orders which modify Acts of Parliament. This process does not shock him. He has searched the annual volumes of Statutory Rules and Orders to find an abuse of the power and is disappointed at the dullness of his discoveries. In particular he investigated the consequences of the much-discussed "Henry VIII clause" (for removal of difficulties) in the Local Government Act of 1929; one unexciting order about the water rate at Bootle was all there was to find.

The power to modify an Act by a rule or order is seldom so serious as it sounds.[2] It is used sometimes for merely verbal or consequential alterations. Thus section 20 (6) of the Mental Treatment Act, 1930, allows an order of the Minister of Health to modify the wording of any enactment, but this was only in order to standardize vocabulary by substituting "mental hospital" for "asylum," "rate-aided person" for "pauper," and so on. Many matters have been dealt with directly by statute in the past which nowadays are dealt with unobjectionably by rule or order. Judicial procedure is an instance; if power is given to a rule committee to make rules of court, there seems no reason why Parliament should not, as in 1875, authorize the rules to modify Acts which contain rules of procedure.[3] There is a neat example in the Housing Act, 1930, where rules of procedure are for once inserted in the statute itself to save time (because, as the Long Vacation was at hand, there would be difficulty in assembling the rules committee), but a power is added for the rules in the Act to be superseded by rules made by the committee later.[4] Elsewhere Parliament sometimes puts into an Act an outline of the kind of detail which it suggests as desirable, leaving it to be varied at the discretion of some other authority, as when it was enacted in 1855 that "the

[1] The observation on p. 118 of his book as to the deceptively negligible step of confirmation possibly requires modification; a confirmatory order is excluded from the S.R. & O. series because it is confirmatory, not because it is executive.

[2] *See Minutes of Evidence* (before the Donoughmore Committee), p. 205, second column.

See 38 & 39 Vict., c. 77, s. 24; *see* also the corresponding and more definite provision in 15 & 16 Geo. V, c. 49, s. 99 and sch. 1, where twenty-five statutes are scheduled as available for total or partial repeal though only one has so far been eliminated. Compare also the recent Scottish clause, 23 & 24 Geo. V, c. 41, s. 16 (*j*).

[4] 20 & 21 Geo. V, c. 39, s. 61, sch. 4. Compare 20 & 21 Geo. V, c. 50, sch. 1, Part III, para. 6.

Metropolitan Board of Works may by order, with the consent of Her Majesty in Council, alter in such manner as they may think fit the rules for the regulation of the thickness of walls contained in the first schedule hereto." [1] If Parliament was never content to leave technical matters to experts, it would be hard to explain why several sections of the Merchant Shipping Act of 1854 begin "Subject to any alteration to be made by Trinity House." [2] Another case where alteration of an Act by rule or order may be deemed appropriate occurs where a change in the general law is likely to play havoc with the existing provisions of Local Acts. Seldom can the draftsman confidently foresee or completely provide for the impact of a public general statute upon outstanding Local Acts; if it is a Local Act that is altered by departmental order, the process seems somehow less sinister. There are critics, of course, who think that any modification of any Act by rule or order is a kind of contempt of the High Court of Parliament (even though Parliament invites the action) and who refuse to discriminate between one instance and another. They will be able to see in an appendix to Mr. Willis's book a classified catalogue of the examples. This useful piece of work, showing his mastery of his material, covers the statutes from 1850 onwards; thus it omits an example which is one of the earliest cases of delegated legislation on the Statute-book. In 1382 an Act provided that assizes should be held in the principal county towns where the shire courts were held; five years later, this statute having been found "in part prejudicial and grievous," another Act empowers the Chancellor to remedy matters "when need shall be, notwithstanding the said statute." This particular power to modify an Act by an order remained operative till 1833 when the power to fix assize towns was handed over entirely to the machinery of Orders in Council.[3]

Some believe that there is too much departmental legislation in England—perhaps indeed too much legislation of all kinds. Others believe there is too little, others again that we hit the happy mean. In this controversy, if such it be, our foreign observers seem to give the departments the benefit of the doubt. Certain imponderable considerations outrange the arguments on either side. Observers may decide that we mind much more what an enactment contains than who enacted it. Watching us when we are most serious, they may have noted that the rules of golf have lately been amended; they may find many devotees inquiring about the substance, few about the somewhat obscure and remote authority. Similarly, if the Marylebone Cricket Club alters the law of leg-before-wicket, it is doubtful if village-green Hampdens will challenge the modification as unconstitutional and *ultra vires*. If only all were agreed that a law was necessary and reasonable, it would matter little whether Parliament or a department made it.

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[1] 18 & 19 Vict., c. 122, s. 55.

[2] *See* 17 & 18 Vict., c. 104, ss. 371–2, 374, 376–8, 380–3, 385; the Act, of course, was granting considerable powers to Trinity House in other directions.

[3] *See* 6 Ric. 2, c. 5; 11 Ric. 2, c. 11; preamble to 3 & 4 Will. 4, c. 71; and s. 72 of 15 & 16 Geo. V, c. 49.

DOMINION AND COLONIAL CASES ON THE CONFLICT OF LAWS FOR THE QUINQUENNIUM, 1928—1932.

[*Contributed by* PROFESSOR R. W. LEE]

I. DOMICIL.

1. **Acquisition of Domicile of Choice, What amounts to.**—*Johnson* v. *Johnson*—Supreme Court of South Africa, Appellate Division—[1931] A.D. 391. The issue in this case was, shortly, whether the parties were married in community according to the law of Sweden, or out of community according to the law of the State of New Jersey in the United States of America. The husband was Swedish by origin ; led a wandering life, in the course of which he settled for some years in the United States, where he was married to respondent and became naturalized ; afterwards settled in South Africa, became a British subject ; lastly, resumed his Swedish nationality and, if he had ever lost it, his domicile of origin. As is usual in such cases, there was much dispute as to the facts and the inferences to be drawn from them. As regards the law, the court agreed in adopting the question framed by Lord Macnaghten in *Winans* v. *Attorney-General.*[1] " The question which your Lordships have to consider must, I think, be this : Has it been proved ' with perfect clearness and satisfaction to yourselves ' that Mr. Winans had at the time of his death formed ' a fixed and settled purpose '—' a determination '—' a final and deliberate intention '—' to abandon his American domicile and settle in England ? ' " Applying this criterion to the present case the majority of the court arrived at the conclusion that Johnson had not before or on marriage acquired an American domicile, *i.e.* the matrimonial domicile was Swedish. Stratford J.A. dissented and added : " Since my view will not prevail, it is unnecessary to discuss the respondent's (wife's) alternative answer to the appeal, namely that the law of present domicile and not the law of matrimonial domicile should apply in this case." Thus the court was spared the necessity of pronouncing on the difficult question as to the effect of a subsequent change of domicile upon the proprietary rights of spouses married in a regime of community without ante-nuptial contract.[2]

2. **Domicile not affected by Enforced Change of Residence.**—*Taylor v. Taylor*—Supreme Court of South Africa, Cape of Good Hope Provincial Division—[1931] C.P.D. 98. This case illustrates a small, but not

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[1] [1904] A.C. 287

[2] Dicey, Rule 186 ; *Lashley* v. *Hog,* (1804) 4 Paton, 581 ; *Saul* v. *His Creditors,* (1827) 5 Mart. (N.S.) 569 ; *De Nicols* v. *Curlier,* [1900] A.C. 21.

unimportant, point in the law of domicile.[1] It was an action for divorce on the ground of malicious desertion in which it appeared that the husband (the defendant) had in the year 1905 come to the Cape and acquired a domicile there, abandoning his English domicile of origin. During the year 1926, in consequence of a criminal conviction the defendant was deported to England, and the deportation order was still operative at the time of the hearing of the action. It was proved that the defendant in his letters to the plaintiff had expressed his intention to return to the Cape, but he had taken no steps to secure the realization of that intention, nor to provide a home temporary or permanent in England, where he was still residing. (The report throws no light on the question whether the defendant would in any event be allowed to return to South Africa.)

The court decided that the plaintiff was entitled to an order for restitution of conjugal rights in the usual form, but that on the return day of the rule *nisi* the defendant should be at liberty to establish the fact that he had abandoned his Cape domicile.

II. Matrimonial Causes.

1. **Formal Validity of Marriage, Putative Marriage.**—*Dame Dastous* (*demanderesse*) v. *Berthiaume* (*défendeur*), Les rapports judiciaires de Québec, 66 Cour Supérieure 241; 45 Cour du Banc du Roi 391. The main point at issue was the validity of a marriage contracted in France by persons domiciled in Quebec with the religious ceremony usual in Roman Catholic marriages, but without the civil ceremony required by French law. Both the Provincial courts pronounced in favour of the marriage and gave the female plaintiff a decree of *séparation de corps* and an alimentary pension. Art. 135 of the Quebec Civil Code, which declares valid a marriage solemnized out of the Province between two persons either or both of whom are subject to its laws, if solemnized according to the formalities of the place where it is performed, was held not to be inconsistent with the possible validity of a marriage contracted abroad in substantial conformity with the forms required by the law of the Province of Quebec. This decision, which is not in accordance with sound principle, was reversed on appeal to the Privy Council.[2] In delivering the opinion of the Judicial Committee, Viscount Dunedin said: " If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum*."

Berthiaume v. *Dastous*, [1930] 1 D.L.R. 849. This reproduces the decision of the Judicial Committee of the Privy Council on appeal from the Province of Quebec, reported in the English Law Reports.[3] The head note is as follows:

> Putting aside the question of capacity, the validity of a marriage is determined by the law of the country where it is celebrated, and a marriage

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[1] See Dicey, *Conflict of Laws*, Rule 18. [2] See below. [3] [1930] A.C. 79.

between persons domiciled in the Province of Quebec, solemnized in France, but without a civil ceremony, being a nullity under the law of France is a nullity in Quebec as well. Nevertheless, under Art. 164 of the Quebec Civil Code, such a marriage produces in favour of a putative wife who has acted in good faith, civil effects including a right to alimony.

2. **Jurisdiction**—(*a*) *Divorce.*—*Breen* v. *Breen*, [1929] 4 D.L.R. 649 (Manitoba K.B.). This reaffirms the principle now well established by decisions of the Privy Council [1] that the court of the domicile is exclusively competent to decree a dissolution of marriage. There can be only one domicile in such actions, and that is the domicile of the husband. The wife cannot acquire a matrimonial domicile separately from her husband.

The New Zealand case of *Harrison* v. *Harrison*, [1928] N.Z.L.R. 668, is to the same effect.

Ruta v. *Ruta and Samuliak*, [1929] 4 D.L.R. 1053 (Manitoba K.B.). The court has no jurisdiction to give costs or damages against a co-respondent who in a divorce action based on adultery committed outside the Province has neither domicile nor residence within the Province, and who has not submitted himself to its jurisdiction.[2]

Biggar v. *Biggar*, [1930] 2 D.L.R. 940, British Columbia Supreme Court. *Held* that an Oregon divorce was ineffectual to dissolve the marriage of spouses domiciled in British Columbia. It was contended for the respondent that the decree obtained as above is in effect a judgment *in rem* so long as it stands unimpeached, falling within the principle referred to by Collins M.R. in *Bater* v. *Bater*.[3] But the judgment of the court in that case was based upon the assumption that the court of New York had jurisdiction. Both the parties had a *bona fide* New York domicile, but the decree had been obtained by concealment of material facts.

Worth v. *Worth*, [1931] N.Z.L.R. 1109. A petition for divorce was removed into the New Zealand Court of Appeal for argument. The parties were married at Cape Town in 1902. In 1911 they entered into an agreement for separation by mutual consent. The wife settled in New Zealand. The husband returned to England, his native country.

By the New Zealand Divorce and Matrimonial Causes Amendment Act, 1930, s. 3, where a wife living in New Zealand prays for divorce on any ground and has been living in New Zealand for not less than three years immediately preceding the filing of the petition and has such intention of residing permanently in New Zealand as would constitute a New Zealand domicile in the case of a *feme sole*, and has been living apart from her husband for a period exceeding three years, she shall be deemed to be domiciled in New Zealand, and to have been at the time of the petition domiciled there for two years at least within the meaning of s. 10 of the principal Act, and, as such, may present a petition to the court praying for a divorce from the other party to the marriage on any one or more of the grounds set forth.

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[1] Dicey, *op. cit.* 5th ed., 283 ff.

[2] Cf. *Sirdar Gurdyal Singh* v. *Faridkote*, [1894] A.C. 670 at p. 683.

[3] [1906] P. at pp. 227–8.

The only point at issue was whether this legislation was *intra vires* of the Parliament of New Zealand—a question of constitutional law, which the court unanimously decided in the affirmative. But the following words of Reed J. have their significance for Private International Law:

> I agree that the Parliament of New Zealand may make such divorce laws as it thinks fit, irrespective of its effect on other nationals or the principles of Private International Law. A divorce granted in circumstances such as exist in the present case—that is, the respondent husband never having been in New Zealand at all—is valid only within the boundaries of the Dominion [of New Zealand]. If either the petitioner or respondent marries again, relying on the validity of the divorce, she or he can, in England, be prosecuted for bigamy, and any children of either of such marriages will in that country be illegitimate. It is only right that persons contemplating a divorce in circumstances such as the present, with the intention of marrying again, should understand the position.

(*b*) *Nullity.—Gagen* v. *Gagen*, [1929] N.Z.L.R. 177. Jurisdiction in petitions of nullity of marriage will be entertained: 1. When both parties to the marriage are domiciled in New Zealand at the time of the institution of the suit;[1] 2. When the marriage was celebrated in New Zealand;[2] 3. When the respondent is resident within the jurisdiction, if he is there resident in a proper sense, and is not merely present in the country as a traveller, or for the purposes of the suit only.[3]

Hutchings v. *Hutchings*, [1930] 4 D.L.R., 673 (Manitoba Court of Appeal). In order for a court to have jurisdiction in a suit for nullity of marriage, the marriage must have been celebrated within the jurisdiction, or the respondent must reside within the jurisdiction, or the parties to the marriage must be domiciled therein.

3. Hindu Marriage, Polygamy.—*Vitamin Distributors* v. *Chungebryen*—Supreme Court of South Africa—[1931] Witwatersrand Local Division 55. On an application for the sequestration of respondent's estate the question arose whether she was a married woman. On its appearing that she was married in India by Hindu rites, the court held that by the law of the Union she was an unmarried woman.[4]

III. ADOPTION.

Statutory Adoption of Children, Effect of.—*Re Donald, Baldwin* v. *Mooney*, [1929] 2 D.L.R. 244 (Can. S.C.). Appeal to the Supreme Court of Canada from the Provinces of Saskatchewan.

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[1] *Salvesen* (or *Von Lorang*) v. *Administrator of Austrian Property*, [1927] A.C. 641.

[2] *Mitford* v. *Mitford*, [1923] P. 130; Dicey, *op. cit.* 5th ed., p. 296, note *r*.

[3] Westlake, *Private International Law*, 7th ed., p. 94, § 49.

[4] *Chetti* v. *Chetti*, [1909] P. 67; Dicey, *op. cit.* 5th ed., p. 280; *Seedat's Exors.* v. *The Master*, [1917] A.D. 302.

A Saskatchewan testator bequeathed a legacy to A.B. and directed that if A.B. should die before him, the legacy should be equally divided amongst A.B.'s children.

A.B. predeceased testator, survived by one son C.D., adopted under the laws of the State of Washington.

Was C.D. entitled to the legacy?

The court referred to *In re Andros,*[1] where Kay J. said: "This will, being an English will, must of course be construed according to English law. That law requires that all who take under a gift to sons of a named father should be legitimate offspring."

Saskatchewan law is the same. "The simple question is, does this adopted child come within the description [of legitimate offspring of A.B.]? It seems perfectly clear that he does not, for the reason that he is not in fact the offspring of [A.B.]. The case of a child legitimated under a foreign law is distinguishable."[2]

IV. MINORS.

Actions by or on Behalf of Minors—Law of Quebec—Law of Ontario.—*Lucas* v. *Coupal,* [1931] 1 D.L.R. 391. Where action is brought in Ontario by minors resident in the Province of Quebec suing by their next friend for damages for a tort committed in Quebec, damages are recoverable only according to the law of Quebec, and since in Quebec minors cannot sue in their own names or by a next friend, but only in the name of their tutor (C.C. Art. 304), the action is not maintainable in Ontario.

Orde J.A. said: "The difficulties necessarily inherent in any case when an Ontario court must deal with a question of Quebec law as a question of fact are here increased by one of the defences, namely, that the infant plaintiffs have no status to enforce either in their own names or through the medium of a next friend a right of action which depends wholly upon Quebec law, and which by that law can be enforced only by a tutor, duly appointed under that law suing in his own name in that capacity. . . .

"If the infant plaintiffs could not sue in Quebec, how can they sue here?"

V. PROPERTY LAW.

1. **Actions affecting Title to Immoveables, Forum Competens.**—*Andler* v. *Duke,* [1931] 3 D.L.R. 561; [1932] 2 D.L.R. 19; *Duke* v. *Andler,* [1932] 4 D.L.R. 529. It is strange that three hearings, involving a double appeal, should have been required to establish the principle formulated by Dicey in Rule 93 that "The courts of a foreign country have no jurisdiction to adjudicate upon the title, or the right to the possession, of any immoveable not situate in such country."

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[1] (1883) 24 Ch. D. 637 at pp. 638–9.

[2] For this see Dicey, *op. cit.* 5th ed., p. 951. (The volume of Reports cited contains a note on "Status and Rights of an Adopted Child.")

The litigation arose out of a contract of sale of land in the city of Victoria, British Columbia, entered into by parties residing in that Province. Subsequently, vendors and purchaser being then resident in the State of California, the vendors, Andler and others, brought an action against the purchaser Duke, first defendant, and his wife, second defendant, to rescind the said contract and to obtain a reconveyance on the ground that first defendant had obtained the conveyance by fraud, and in pursuance of that fraud had obtained registration of the said conveyance in the Land Titles Registry at Victoria followed by certificate of indefeasible title to himself, and subsequently in further fraud of plaintiffs' rights had conveyed the lands to second defendant, who was party to the fraud.

The Californian court (1) ordered defendants to reconvey the land to plaintiffs according to the forms and laws of British Columbia; and (2) in the event of failure or refusal on the part of the defendants, the Clerk of the Court was appointed Commissioner of the Court, and ordered and empowered to execute such deed and cause the same to be recorded and registered and to do any and all other acts necessary to effect a conveyance of the said Victoria property to the plaintiffs. The defendants having failed to execute the reconveyance, the Clerk of the Court as Commissioner *ad hoc* did so in their name, and thereafter the plaintiffs made application to the Registrar of Titles at Victoria to have the reconveyance registered so as to vest title in themselves thereunder. The Registrar having refused to do so, proceedings were initiated before the Supreme Court of British Columbia, which in due course made the following order: "That by virtue of the said judgment [of the California court] and by virtue of the conveyance . . . duly executed by . . . the Clerk of the said court . . . as a Commissioner . . . the plaintiffs are the owners in fee simple [of the lands in question].

"And this court doth further order and adjudge that the said lands vest in the plaintiffs."

On appeal to the British Columbia Court of Appeal[1] the majority judgment (3 to 1) was delivered by Martin J.A. The learned judge said that the action was wrongly framed since it was founded solely upon and *by virtue of* the California judgment. The British Columbia court should have been asked "to implement and give effect to the California judgment by vesting the land in question in the plaintiffs," and an amendment of the claim in this sense was, after hearing counsel, permitted. Accordingly judgment was pronounced in terms of the amended claim. The court rejected the submission of defendants' counsel "that the California judgment cannot be recognized at all, and that there must, irrespective of it, be a trial of the whole matter upon the merits here before we can pronounce any judgment."

McPhillips J.A., in a vigorous dissenting judgment, maintained that the California court had acted entirely without jurisdiction, and that the

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[1] [1932] 2 D.L.R. 19.

British Columbia court (from which the appeal was taken) had abdicated its functions in adopting the judgment of the foreign court without a hearing upon its part of the merits of the matter in issue between the parties.

On further appeal to the Supreme Court of Canada the judgment of the British Columbia Court of Appeal was unanimously reversed.[1]

The judgment of the Supreme Court proceeded upon the principle formulated by Dicey in Rule 93, *supra*.

It is true that it is a general rule that the judgment of a foreign court of competent jurisdiction having the force of *res judicata* in the foreign court has the like force in England (or British Columbia).

But "the numerous decisions referred to seem to establish beyond question that such a judgment [as that of the California court] is *in personam* only, and affects the conscience of the parties within the jurisdiction of the court, and stands on an entirely different footing in the courts of the country where the land is situated from the ordinary judgment coming within the general rule, such as a foreign judgment for debt."

2. **Application of the lex situs.**—(*a*) *Nature of Property.—Re Burke*, [1928] 1 D.L.R. 318 (Saskatchewan K.B.). Whether property is a moveable or an immoveable is determined by the *lex loci rei sitæ*.

Real property in Saskatchewan, although subject to an agreement for sale, is, nevertheless, an immoveable and its distribution upon the death intestate of the owner domiciled out of the jurisdiction is therefore governed by the law of Saskatchewan.

(*b*) *Wills of Immoveables.—Re Colville*, [1932] 1 D.L.R. 47. In this case, which came before the Supreme Court of British Columbia, two wills were in question. The first, made in British Columbia by a British subject there domiciled, disposed *inter alia* of immoveable property situate within the Province. It was executed in the form required by the local law. The second, made in California by the same testator, who had acquired a Californian domicile, purported to revoke the previous will. It was a holograph will which satisfied the requirements of Californian law. Subsequently the testator became a citizen of the United States of America.

Since testator was domiciled in California at the time of his death, the Californian will was a valid disposition of his moveable property—*mobilia sequuntur personam.*[2] But it was ineffectual to dispose of land situated in British Columbia, because wills of land in point of form must satisfy the requirements of the *lex rei sitæ*. Further, being ineffectual to dispose of the British Columbia immoveables, the Californian will was *pro tanto* ineffectual to revoke the earlier British Columbia will. These were the principal points decided. The court (unnecessarily?) considered the effect of the British Columbia Wills Act Amendment Act, 1924 (c. 47), s. 14 A, which corresponds (with verbal variations) to the

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[1] [1932] 4 D.L.R. 529.

[2] Dicey, *op. cit.* Rule 194.

British Wills Act, 1861 (commonly known as Lord Kingsdown's Act), s. 1. This Act recognizes as valid in point of form, but only as regards personal property, a will made outside of the Province by a British subject whatever was his domicile at the time of making the same or at the time of his death, if the same was made according to the form required either by the law of the place where such person was domiciled when the same was made, or by the law of the place where the same was made, or by the law then in force in that part of His Majesty's dominions where he had his domicile of origin. This section, it will be observed, applies only to the wills of British subjects, and a will executed in accordance with its provisions does not (so the court held) cease to be valid in consequence of testator ceasing to be a British citizen. This is the view expressed in Dicey,[1] though unsupported, so far, by English judicial authority.

The Act supplements and leaves unimpaired the general rule of Private International Law by which a will of moveables is governed in point of form by the law of testator's domicile at the time of death.

It seems, therefore, that in the circumstances it was unnecessary to invoke the Act at all.

The case under consideration makes no reference to the subject of *renvoi*, but in a note annexed to it Dean John D. Falconbridge, K.C., of Osgoode Hall, Toronto, takes occasion to remark that the learned judge upheld the holograph will as a valid disposition of personal property in British Columbia because it was valid by the local law of California and " did not consider, as Sir James Hannen did in a parallel case, *Re Lacroix*, (1877) 2 P.D. 94, whether the will was valid in British Columbia because it was made in accordance with the rules of Conflict of Laws of the domicile." The case is therefore (says Mr. Falconbridge) not inconsistent with the view advocated by himself in an article on *Renvoi and Succession to Movables* at pp. 1–47 in this volume of Reports, namely that the doctrine of the *renvoi*, as applied to succession to moveables, should be wholly rejected.[2]

It should be remarked that the term " personal property " which occurs in the statute cited above, though, generally speaking, equivalent to moveables, is of wider scope, since it includes also leasehold interests in land. It is unfortunate that this technicality of English law should have been allowed to introduce an unnecessary complication in the field of Private International Law.

In re Butchart (*deceased*) : *Butchart* v. *Butchart*, [1932] N.Z.L.R. 125. By the (New Zealand) Family Protection Act, 1908, s. 33 (1) :

> If any person . . . dies leaving a will and without making therein adequate provision for the proper maintenance and support of wife, husband or children, the court may at its discretion on application by or on behalf of the said wife, husband or children, order that such provision as the court thinks fit shall be made out of the estate of the testator for such wife, husband or children.

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[1] *Op. cit.* 5th ed., p. 810, note *n*.

[2] This article was originally published in the *Law Quarterly Review*, October 1930 and April 1931, and is republished with additions and changes.

In this case testator died domiciled in Scotland, leaving a wife and daughter resident in New Zealand. Application was made by them under the Statute for provision out of land of testator situated in New Zealand. The court made an order ; it held that the validity of a will affecting an immoveable such as land and the rights of succession thereto, including the testator's capacity to deal with the whole of his estate so far as consisting of such land, is governed by the *lex situs* and not by the law of domicile. *Hicks* v. *Powell*, (1869) L.R. 4, Ch. App. 741 followed.

VI. CONTRACT.

1. **Choice of Law.**—(*a*) *Charter Parties and Bills of Lading.*—*Richardson* v. "*Burlington*," [1930] 4 D.L.R. 527 (Supreme Court of Canada in appeal from the Exchequer Court). "The general rule of English law as to contracts applies to charter parties and bills of lading, and they will be governed by the law by which the parties intend to be bound, but in the absence of other indications the parties will be taken to have intended to bind themselves by the law of the ship's flag, and not, as in other contracts, by the *lex loci contractus*." [1]

(*b*) *Contract to purchase shares in a Foreign Corporation.*—*American Seamless Tube Corp.* v. *Goward*, [1930] 3 D.L.R. 870 (British Columbia Supreme Court). The defendant intended to purchase treasury shares in a California corporation and made application to the company's agent in British Columbia for the shares. He received shares owned by one Ahlburg, though he did not know until the present action was brought that he had not received treasury shares. His name was entered on the company's register of members, he received dividends from the company and contributed money towards the company's rehabilitation. In an action by creditors of the company to make the defendant liable under the law of California for a part of the company's debts proportionate to the amount of his shares, it was held that the question whether the defendant had impliedly contracted with the plaintiffs to be liable for a portion of the company's debts must be decided according to the law of British Columbia, and under the law of that Province the defendant never became a shareholder in the company, because no contract making him a shareholder ever came into existence, nor was the defendant estopped from denying that he was a shareholder.

American Seamless Tube Corp. v. *Goward*, [1931] 1 D.L.R. 878 (in appeal to the British Columbia Court of Appeal). The Court of Appeal held that where a person purchases stock in a corporation in a foreign country by whose laws certain liabilities attach to shareholders, the question whether the purchaser was or was not a shareholder by contract or by estoppel must be determined by the *lex contractus* [scil., *lex loci celebrationis*].

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[1] The report contains also some observations on the interpretation of the (U.S.A.) Harter Act, s. 3.

As the court took the view that there was no contract (a question to be decided by the *lex loci celebrationis*), it became unnecessary to decide whether, if there had been a contract, it would have been governed by the law of British Columbia or of California. McPhillips J.A. said: "The *onus probandi* is upon the party asserting the obligation to establish that there was a contractual obligation assumed by the respondent to be bound by the law of the State of California, and there is absolutely no evidence to support this."

2. **Offer and Acceptance.**—*Renfrew Flour Mills* v. *Sanschagrin limitée*, [1928] 45 Cour du Banc du Roi 29. An offer was sent by messenger from Ottawa in Ontario to Three Rivers in Quebec, where an acceptance was posted. The court held that the contract was concluded at Ottawa and not at Three Rivers. In doing so it followed a decision of the Supreme Court of Canada, distinguishing the effect of a posted acceptance of a verbal offer and the posted acceptance of a posted offer. [The distinction has no sound juridical basis. In both cases convenience is in favour of the doctrine that the posted acceptance concludes the contract.]

3. **Illegality.**—*National Surety Co.* v. *Larsen*, [1929] 3 D.L.R. 79 (B.C.S.C.), 4 D.L.R. 918 (B.C. Ct. of App.). Plaintiff company sought to recover on a mortgage executed in British Columbia on land situate in the Province given to secure plaintiff company against loss under a certain bail bond into which it had entered to secure attendance of defendant's husband at his trial in the State of Washington. The husband did not appear, and the bail was estreated. In the State of Washington the arrangement entered into between the company and the defendant is not illegal. In British Columbia it is held to be illegal as contrary to public policy. All the arrangements and negotiations leading up to the mortgage except its actual execution took place in the State of Washington. In these circumstances, was the mortgage enforceable? The lower court held that it was not. "Inasmuch as the giving of this security offends against our ideas of natural justice and right dealing, I feel obliged to hold that the contract is not enforceable in our courts."[1] This was reversed by the Court of Appeal. The judgments enter into the questions of the enforcement of foreign contracts in general, but what was no doubt the *ratio decidendi* is put shortly by Macdonald C.J.A., who said: "Bail proceedings, except those in our own courts, are not of our concern."

4. **Unpaid Vendor's Right to revindicate Moveables.**—*Re Satisfaction Stores*, [1929] 2 D.L.R. 435 (Nova Scotia S.C.). In the Province of Quebec, in case of the insolvency of a purchaser an unpaid vendor may exercise the right of revindication within 30 days of delivery (C.C. Art. 1543). In this case the goods were sold and delivered in the Province of Quebec to a purchaser, residing in Nova Scotia, where no such rule obtains, and were forthwith conveyed by the purchaser to the last-named Province. The vendor having sought to make good his right of revindication against

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[1] *Saxby* v. *Fulton*, [1909] 2 K.B. (C.A.) 208.

the Nova Scotia trustee in bankruptcy, it was held that he could not do so. "Every state has entire jurisdiction over all property, personal as well as real, within its own territorial limits, and the laws of the state regulate and control its sale and transfer, and all rights which may be affected thereby. . . . If a foreigner or citizen of another state send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it." [1]

5. **Antenuptial Contract, Law Applicable.**—*Johnson* v. *Registrar of Deeds*, [1931] Supreme Court of South Africa, Cape of Good Hope Provincial Division, 228. Johnson, domiciled in England, married in the Cape Province in the Union of South Africa with ante-nuptial contract, which he offered for registration. The Registrar declined to register on the supposition that the contract was not governed by the law of the Union, and that registration of the contract would be superfluous. The court ordered registration, pointing out that a contract is construed in principle (in the absence of a contrary intention) according to the rules of the *lex loci contractus*, that the principle applies to antenuptial contracts,[2] and that if an antenuptial contract executed in South Africa by a domiciled Englishman can be effectual, it is very desirable that it should be executed according to the formalities of the *lex loci contractus* (though this might not be a necessary condition of its validity in England).[3]

VII. Miscellaneous.

1. **Statute of Limitations.**—*Col. Inv. & Loan Co.* v. *Martin*, [1928] 1 D.L.R. 791 (Manitoba Ct. of App.). The question whether an action is barred by the Statute of Limitations is a question of procedure and governed by the *lex fori*. An action on the covenant in a mortgage, whether the land mortgaged is within or without the Province, is barred by the Real Property Limitations Act, R.S.M. 1913, c. 116, in ten years.

2. **Foreign Law, Evidence.**—*Key* v. *Key*, [1930] 3 D.L.R. 327 (Ontario Supreme Court, Appellate Division). The general law of a foreign state is presumed to be the same as that of the domestic jurisdiction, and the *onus* of proving that it is different is upon those who so contend.[4]

3. **Foreign Note, Rate of Interest.**—*Barbour* v. *Paradis*. Rapports Judiciaires de Québec, Cour Supérieure, (1929) vol. 68, p. 31. The general rule is that interest is to be paid on contracts according to the law of the place where they are to be performed. Where a note for $500, with $10 weekly interest, is made and delivered in a foreign country by a person domiciled in the Province of Quebec, and no place of payment is

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[1] Cf. *Clark* v. *Tarbell*, (1877) 58 New Hampshire 88.

[2] *In re Barnard*, (1887) 56 L.T. 9; Dicey, *op. cit.* 5th ed., p. 670.

[3] Dicey, *op. cit.* Rule 159, Exception 3.

[4] See *Dynamit Actien-Gesellschaft* v. *Rio Tinto Co.*, [1918] A.C. 292.

indicated, the rate of interest is governed by the law of the place where the defendant is domiciled.

Quebec C.C., Art. 1152, provides that " If no place of payment is indicated, payment must be made at the domicile of the debtor."

4. **Foreign Judgment in Personam, Effect.**—*Bonn* v. *National Trust Co. Ltd.*, [1930] 4 D.L.R. 820 (Ontario Supreme Court, Appellate Division).—A foreign judgment *in personam* cannot be applied to persons other than those who were parties to the litigation decided by it. A foreign judgment is presumed to be valid unless and until it is shown to be invalid.

When different persons are appointed administrators of the same estate in different States they remain in contemplation of law two distinct persons and there is no privity between them. Thus, where a judgment *in personam* is obtained against one such administrator in the State in which he was appointed, in an action upon a promissory note alleged to have been made by the intestate, that judgment will not be enforced by means of an action against the other in the State in which the latter was appointed. [Riddell J.A. " The fact that the two defendants happen to be both administrators of the estate (or some part of it) has no more significance than if they had happened to be members of the same secret society." . . .[1] " While no English case is cited in support of this proposition, there has been found no decision adverse to it, and I am of opinion that our law is as stated."]

In order to be enforced by means of an action in the local *forum*, a foreign judgment must be for a sum certain. Foreign law is presumed to be the same as the law of the *forum*. Thus, as a judgment *in personam* against an Ontario administrator as such does not amount to a judgment for a sum certain according to Ontario law, similar effect will be given to a like foreign judgment, and such foreign judgment will not be enforced, unless its effect is proved to be otherwise according to the foreign law.

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[1] Story, *Conflict of Laws*, 8th ed., p. 739.

INDIAN AND FAR EASTERN CASES ON THE CONFLICT OF LAWS, 1928–1933.[1]

[*Contributed by* S. VESEY FITZGERALD, ESQ.]

THE principal cases of interest which have arisen during this period have been those connected with the application of personal law in Burma and the Farther East, with the inter-religious marriage and divorce, and with liability to taxation. There have also been a few cases of interest on other points.

Buddhist Law—Burmese and Chinese Buddhists.—There has been an interesting dispute as to the law governing the succession to a " Chinese Buddhist " dying domiciled in Burma.

The Indian Succession Act, 1925, (ss. 29 and 58) excludes " Buddhists " from its provisions for distribution of inheritance and the Burma Laws Act, s. 13 (i) directs that Buddhist law be applied to them. In *Chan Pyu* v. *Saw Sin*, (1928) 6 R. 623 and 631 the then Chief Justice of Rangoon voiced the opinion (which up till that date appears to have been prevalent) that Chinese customary law is to be applied. In *Phan Tiyok* v. *Lim Kyin Kauk*, (1930) 8 R. 57 F.B. the question was referred to a full bench consisting of the officiating Chief Justice and four other judges, each of whom delivered a separate judgment. They were unanimous, however, in holding, in answer to the issue referred to them, that the system known as Burmese Buddhist Law did not apply to such a case ; they also agreed in saying that the term Buddhist law is meaningless, the Buddhist religion as such, unlike other religions, never having developed a juristic side. They were therefore unanimous in holding that under s. 13 (3) of the Burma Laws Act such an estate must be distributed according to " justice equity and good conscience." But they differed as to what rule should be applied under that name. The officiating Chief Justice discussed the difficulty of ascertaining what degree of veneration for the Buddha would entitle a Chinaman to be called a Buddhist, and the further difficulty of ascertaining the archaic and manifold Chinese customary law : and he and three of his brethren held that, in spite of the express prohibition of its application as statute law, the provisions of the Indian Succession Act should be applied, as they are to the estates of non-Buddhist Chinese domiciled in Burma : the dissentient judge was in favour of endeavouring to ascertain and apply Chinese customary law.

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[1] Article based in part on reports submitted in conjunction with Professor R. W. Lee to the International Academy of Comparative Law for the years 1928, 1929, 1930, 1931–2.

This decision is contrary, so far as the refusal to apply Chinese customary law is concerned, to a number of previous decisions: soon after it the point at issue was incidentally considered by the Privy Council on two occasions, but without any definite pronouncement. In the first of these cases *Bon Kwi* v. *the firm of S.K.R.S.K.R.*,[1] the Privy Council noted the above-cited opinion in *Chan Pyu* v. *Saw Sin*,[2] and also took note of two books which judges in Burma are in the habit of consulting on that law. In *Maung Sein Done* v. *Ma Pan Nyun*[3] the Privy Council decision proceeded solely on the ground of *res judicata*: but it reversed a decision of the High Court which had followed *Phan Tiyok's* case. Finally, in *Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin*,[4] Chief Justice Page and one other judge followed *Phan Tiyok's* case only so far as it held that Burmese Buddhist law is not applicable to Chinese Buddhists, but declined to follow the Full Bench any farther on the ground, technical to Indian procedure, that the Full Bench was lawfully seised only of the specific question submitted to it, and that everything not necessary for its reply to that question must be treated as *obiter*.

The Chief Justice scouted the idea that there need be any particular difficulty in ascertaining Chinese customary law [and incidentally one may suggest that the difficulty of ascertaining any system of law is no reason why judges should not make the attempt]: he referred to the two books cited in *Chan Pyu's* and *Bon Kwi's* cases and to the existence in Rangoon of numerous persons learned in Chinese customary law; and to a number of analogous cases from India on the definition of the terms "Hindu Law" "Muhammadan Law." On this point he might in fact have quoted an even greater wealth of decisions to show that, British rule being impartial in matters of religion, such terms cannot be interpreted as connoting any particular brand of religious orthodoxy. Hindu law is simply the personal law followed by modern Hindus, Muhammadan law that followed by modern Moslems: and from this point of view the customary law of a Chinese Buddhist is as much entitled to the name "Buddhist Law" as the literary law of a Burmese Buddhist. Neither of them has any connexion, direct or indirect, with the Buddha: each is equally obeyed by a section of his followers to-day.

Chief Justice Page's judgment carries conviction, and one may hazard the prognostication that it will be upheld by the Privy Council in the event (which is obviously desirable) of the question coming before the ultimate tribunal to be set finally at rest. Meanwhile one may observe that either solution involves an anomaly, thus:—

(*a*) Following *Phan Tiyok's* case. A, a Burman, and B, a Chinese, are equally Buddhists: but A's relatives get the benefit of his personal law with which they are familiar on distribution of his estate, B's do not.

(*b*) Following *Tan Ma Shwe Zin's* case. C, a Buddhist, and D, a

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[1] P.C. Appeal No. 260, 1928 (later in point of time than *Phan Tiyok's* case, but before its publication).

[2] (1928) 6 R. 623 at 631.

[3] (1932) 36 C.W.N. 726.

[4] (1932) 10 R. 97.

Confucian, are both subject in life to Chinese customary law (*e.g.* as regards marriage and paternity): but on death that law applies to C's estate, not to D's.

Two other considerations arise on these cases:

(*a*) In both the Privy Council cases a Burmese Buddhist woman who married a Chinese Buddhist was found by the lower courts as a fact to have become a Chinese Buddhist and subject to Chinese customary law. No change of religion (or nationality?) appears to be involved. The subjection to Chinese customary law is not a necessary (though obviously a probable) consequence of the marriage, but has to be proved as a fact. It appears from the case next cited below that such marriages are in the first instance usually contracted according to Burmese Buddhist law.

(*b*) The phrase "Chinese Buddhists" is used to describe persons of Chinese origin (and their wives) domiciled, and even naturalized, in Burma, but retaining customs of the land of their origin. For the estates of persons of Chinese domicile, Chinese law as it exists to-day in China would presumably have to be applied; and that is, at any rate on paper, a statute law based on Western models, not the ancient customary law. This point arose and was very clearly dealt with in the case of *Ma Sein Byu* v. *Khoo Soon Thye*[1] which followed *Tan Ma Shwe Zin's* case. An attempt to persuade the court that the new Chinese Civil Code was merely a restatement of customary law met with the failure it deserved. The case also contains much of interest about the nature of marriage in Chinese law both before and after the Code. Leach J. remarked that the Chinese legislature has no authority over Burma, nor consequently over Chinese domiciled therein: but an interesting question looms in the future: what law will be applied hereafter to a Chinese who, after having been subject in China to the new codified law, subsequently acquires a domicile in Burma? May one hazard the suggestion that the principle of *Abdur Rahim* v. *Halimabai*[2] affords a clue and that he will be held to have become a member of the Chinese community domiciled in Burma and thereby to have adopted its laws?

Chinese Customary Law—Legitimacy—Straits Settlements.—In *Khoo Hooi Leong* v. *Khoo Chong Yeok*[3] it was held by the Privy Council (Lord Russell of Killowen) that the Chinese custom of legitimation of a natural son by subsequent recognition is not part of the law of the Straits Settlements: and further that "legitimation of a child, whose parents are not husband and wife is unknown and repugnant to the common law of England, and no hardship (much less injustice or oppression) need result from a refusal to admit a modification in this respect of English law in its application to Chinese."

This implies a relation between English law and the personal laws of Oriental races which is, as was shown by reference to previous decisions, no doubt the accepted view in the Straits Settlements; but it would be an entirely incorrect view in the Indian Empire, and, the present writer submits, also in the majority of the tropical possessions of the Crown. It would, for instance, be in the highest degree unsafe to argue on the basis of this decision that such a legitimation would be ineffectual among the Chinese community domiciled in Burma. English law is used throughout the Empire, consciously and unconsciously, as a means to develop and expand Oriental systems: but it is not treated as a standard of right reason by which those laws should be measured, still less is it regarded as a law of universal application on which such systems can do no more than engraft a few non-repugnant modifications. The decision is specially noteworthy, coming as it does in a field in which English doctrines, even by comparison with other systems of European law, are exceptionally narrow. Both French and Italian law allow some legal effect (though not, it is true, legitimacy) to a mere acknowledgment of paternity. Further, does not the very language of Lord Russell's judgment admit what the rule in *Hyde* v. *Hyde* [1] is commonly supposed to deny, namely that to a personal law which permits polygamy it is possible to apply rules which grew up under a monogamous system?

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[1] (1933) 11 R. 310.

[2] (1915) 43 I.A. 35.

[3] [1930] A.C. 346, (1930) 59 M.L.J.R. 256 P.C.

Siamese Law—Muhammadan Law—English Law of the Straits Settlements.—*Tuan Man* v. *Che Som*, (1932) 63 M.L.J.R. 369 P.C. In this extremely complicated case it became necessary to decide what would have been the law affecting the devolution of the landed estate of a Muhammadan in the kingdom of Siam in 1867. In spite of the fact that the parties, his descendants, were all Muhammadans and had in 1903 submitted to the jurisdiction of a *Kathi* (*Qadi*) or Muhammadan religious judge, nobody appears to have thought of urging that there was a presumption in favour of the orthodox (in this case Shafii) Muhammadan law—even though the application of that law was the foundation of the plaintiff's case. Accordingly, it was held that, in the total lack of evidence, the law of Siam in 1867 must be judged by the standards of English law; and that as by that law the only proper plaintiff to recover the assets of a deceased person is the legal personal representative of the deceased, this suit failed as not being brought by a duly constituted personal representative. Such a conception is, of course, entirely foreign to Muhammadan law. Here again English law was applied to the personal law of Orientals in a manner probably peculiar to the Straits Settlements. And, indeed, was it the case that in 1867 the personal representative was a necessary party to a suit for the recovery of realty in England? The law of the Straits Settlements at that date was not considered in the case. These considerations, however, do not affect the substantial justice of the decision.

Ceylon Law—Roman Dutch Law—Muhammadan Law.—In *Weerasekera* v. *Pieris*, [1933] A.C. 190, 34 New L. R. (Ceylon) 281, the Privy Council had to consider a curious doctrine which had found favour in the Supreme Court, viz. that a *fidei commissum* executed by a Moslem under the Roman Dutch law (the common law of Ceylon) must first be valid under the Muhammadan law of gifts before its validity as a *fidei commissum* could be considered. The inconveniences of such a doctrine are obvious since the very idea of a *fidei commissum* is repugnant to the absolute character of ownership in Moslem law. The Privy Council rejected the doctrine, thereby rendering purely academic the discussion which had occupied the Supreme Court in *Sahul Hamid* v. *Mohideen* [1] as to the retrospective character of an ordinance, the effect of which is the same as that of the Privy Council decision.

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[1] (1866) 1 P. & M. 130.

Marriage Law, Change of Religion, its effect on Marriage.[2] (*a*) *Hindu to Moslem.*—By Hindu law marriage (save in a few comparatively unimportant castes) is indissoluble: by Muhammadan law conversion to Islam operates as dissolution of marriage unless either (i) it is the husband who is converted, and the wife is a *kitabia*, or (ii) the conversion of the other spouse (or spouses, if wives up to four) follows within three months. In Cyprus and Palestine [3] the dissolvent effect of such a conversion is fully recognized. In India there has in the past been some dispute about it. Two cases in the period under review are noteworthy. In *C.V.N.C.T. Chedambaram Chettyar* v. *Ma Nyein Me* [4] a Hindu husband deserted his wife, migrated to Burma and became Moslem: thirty years later he died and she claimed to succeed as his widow under either Hindu or Moslem law. It was held that Moslem law as the law of the *de cujus* must be applied to the whole estate whether acquired before or after conversion: by that law she was not his wife since a Moslem cannot be married to an idolater and such marriage is dissolved by conversion. [There was nothing to show that the choice of accepting Islam had ever been formally offered to the wife, a step which some Moslem lawyers hold to be essential to the dissolution of marriage.] Moreover, by Moslem law difference of religion is in any case a bar to inheritance, and the Freedom of Religion Act, XXI of 1850, while it protects a convert from this rule, does not protect those who but for his conversion would have separated from him. Accordingly, the Hindu widow got nothing. Whether she could have enforced a claim to alimony in her husband's lifetime is by no means clear, but there is nothing in this decision against such a claim.

The other case, *Musst. Ayesha Bibi* v. *Bireshwar Ghosh Mazumdar*, being an uncontested case, is only reported in (1929) 33 C.W.N. (notes portion) clxxx. Here the court was called upon to exercise the functions of a Qazi and to summon the Hindu husband to adopt Islam. On his refusal, it declared the marriage dissolved. The dissolution of the marriage being at the suit of the wife, no question of alimony arose. An interesting discussion of the whole problem by leading counsel for the plaintiff in answer to criticisms which had reached him appears in 33 C.W.N. (notes portion) clxxxvii.

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[1] (1933) 34 New L.R. 57.

[2] See also notes on Moslem Jewish marriage in Palestine, in the last number of this Journal (vol. xv, p. 270) and in this number (p. 146).

[3] *Reg.* v. *Christodoulo*, (1893) 2 Cyp. 126; *see also* Goadby, *International and Inter-religious Private Law*, pp. 166 and following.

[4] (1928) 6 R. 243.

Marriage Law, Change of Religion.—(*b*) *Christian to Hindu.—Moraji* v. *Adm. Gen. Madras*, (1929) 52 Mad. 160. A lady of Austrian parentage and English domicile (of origin?) having resided in India for twelve or thirteen years renounced Christianity, adopted Hinduism by undergoing formal conversion and married in accordance with Hindu religious rites a man of Hindu race and religion. She also quite clearly acquired an Indian domicile whether by marriage or choice. By her will (unattested) she left all her property to her husband. Under the Indian Succession Act, XXXIX of 1925, the will was valid if she was a Hindu, invalid if she was not. The court held (1) that for the purposes of the Act "Hindu" must be understood in a religious, not a racial sense; and (2) that a Christian can be converted to Hinduism.[1] The lady therefore died a Hindu and the will was valid. The court also held the marriage of testator and her Hindu husband valid: although she could not enter his caste, she did enter a lower caste than his and the marriage was therefore valid in the *anuloma* form—though the learned judge guarded himself against being supposed to hold that even the converse case would have been necessarily invalid.

In this connexion *Maharaja Kumar Gopal Saran Narain Singh* v. *Sita Devi*,[2] is interesting, not so much for what it decides, as for the pleas which were abandoned in it. An Australian divorcee had gone through a form of conversion to Hinduism, and married according to the rites of the Arya Samaj (a reformed sect which does not recognize caste) a Hindu maharaja. It is not shown that the husband ever joined the Arya Samaj; and the rites of that sect are commonly used in India to facilitate inter-caste marriages. A plea that the marriage was invalid by reason that the wife's conversion was merely nominal was abandoned.

Marriage Law, Interreligious Marriage without Conversion.—*Seinapatti* v. *Seinapatti*, (1932) 136 I.C. 262, 33 P.L.R. 339 (not in the official reports).

The respondent, a Hindu, married the petitioner, a Christian lady, by licence in a church in Manchester. After living with the respondent for some time in India she returned to England and the respondent married a Hindu lady in India by a Hindu form of marriage and had a son by her.

S. 10 Indian Divorce Act, 1869, under which the wife petitioned does not constitute simple adultery by the husband a sufficient cause for divorce: but it gives among its list of aggravated adulteries which are sufficient cause for divorce: bigamy with adultery; marriage with another woman with adultery.

It was held that the conduct of the respondent did not come within the former of these alternatives, since his personal law permitted him two wives (and he could not have been convicted under s. 494 Indian

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[1] This proposition was formerly denied. *See* Leslie de Gruyther, K.C., in *Journ. of Comp. Leg.*, 3rd series, vol. xi., p. 36: "No one can by profession of faith become a Hindu."

[2] (1931) 36 C.W.N. 392.

Penal Code of the criminal offence corresponding to bigamy in English law): yet since his first marriage was of the exclusive kind, cohabitation under his second marriage might be described (*sci.* from the point of view of his first wife) as adulterous: and therefore the first wife was entitled to relief under the latter clause. But how can matrimonial intercourse be lawful from one point of view and unlawful from another? Would the court have been prepared to hold the child of the Hindu wife illegitimate?—that is surely the result of holding the intercourse by which he was begotten to be adulterous. The court appears to have thought that it was bound by the English decisions in *Chetti* v. *Chetti* [1] and *Ex parte Mir Anwaruddin* [2] to hold that the English marriage was valid and binding on the respondent in spite of his personal inability as a Hindu to contract it. This, it is submitted, is not correct: the courts in those cases only purported to declare the law of England, not the law of India which they were incompetent to pronounce upon. Even on the stricter English principles the validity of a marriage is governed in the first instance by the personal law of the husband, and Sir Gorell Barnes in the former case did not say that the incapacity of a Hindu to marry outside Hinduism was of no effect in India, but merely that it could not be recognized in England. The correct statement of Indian law is that by Sir Bhashyam Ayangar in *Chetti* v. *Chetti*.

In this connexion the much-discussed case of *Lendrum* v. *Chakravarti* [3] is of interest.[4] H, a Brahmo Samajist, domiciled in British India, represented to W, a Christian, that he was not a Hindu; and that by the law of India he was entitled to enter into a monogamous marriage with her. They were accordingly married in a church in Glasgow. Some years later she petitioned for a declaration of nullity. The Court of Session appears to have assumed that it had jurisdiction to make a declaration of nullity in spite of the husband's Indian domicile, a somewhat questionable proposition, and even if correct objectionable, since it involved constituting itself the court to decide difficult questions of Indian law on which the courts of the husband's domicile might conceivably take a different view. With one important exception, noted below, the findings of the court as to Indian law appear to have been correct. The finding on which the declaration rested was to the effect that "there was no *consensus ad idem* as the pursuer intended, and thought that . . . she would acquire the legal status of the wife of C in India, but under this personal law C was incapable of contracting a valid marriage with the pursuer and conferring upon her the status of a lawful wife in India." As C acted under exactly the same belief, it is difficult to see how this could be described as a lack of *consensus ad idem*: and it appears to be simply a roundabout way of saying that *quoad* capacity the law of the husband's domicile must determine the validity of the marriage. Such a decision is, of course, quite inconsistent with *Chetti* v. *Chetti*, as well as with the Scottish court's own action in accepting jurisdiction in the suit. But it is in line with *Salvesen* v. *Salvesen*, and there is much to be said in its favour.

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[1] [1909] P. 67.
[2] [1917] 1 K.B. 634.
[3] (1929) S.L.T. 96.

[4] A summary by W. E. Beckett in 48 L.Q.R. 354, 355 will be useful to those who have no access to Scottish reports.

The error of Indian law consisted in holding that because C, a Brahmo Samajist, was in a sense a Hindu,[1] therefore Hindu law in its entirety applied to him. The exceptional position of the Brahmo Samajists is well recognized. The monogamous character of Brahmo marriage was forcibly illustrated in *Sonaluxmi* v. *Vishnuprasad*.[2] It was for their benefit that the Special Marriage Act, 1869, was passed: and it has been judicially recognized[3] that a Brahmo may avail himself of his right under that Act to declare that he is not a Hindu and so enter into a binding marriage under the Act, and yet may remain a Hindu for all other purposes. True, the Special Marriage Act does not apply to Christians; but with what justice could it be said that a Brahmo Samajist was barred by his religion from marrying a Christian when other marriages outside the pale of Hinduism, *e.g.* with an animist or an agnostic, were clearly open to him?

In *Mabel Ferris* v. *Emperor*[4] the wife actually underwent a nominal conversion to Islam: this fact, however, does not affect any of the points actually decided. A marriage was contracted in South Africa between wife, a British subject, and husband, a Moslem subject of a Hindu Native State. The parties thereafter removed to the husband's State (Baroda), where the husband had a previous wife living, a fact which he had not disclosed at the time of his South African marriage. Subsequently the wife left her husband, and, a criminal charge having been preferred against her, it was sought to obtain her extradition from British India. The court held that she had not in consequence of her marriage lost her status of a "European British subject" as defined by the Indian Code of Criminal Procedure, and therefore was not liable to extradition, even if she were a subject of the State of Baroda. Further (though this point was not decided) it appeared that, since the British Nationality and Status of Aliens Act, 1914, is not in force in British India, the rule of the English Common Law (prior to 1844) applies, by which a woman's nationality is not affected by her marriage with a foreigner. The court referred to *Countess of Conway's* case, (1834) 2 Knapp 364, where Parke, B. said (p. 368): "A Frenchwoman becomes in no way a British subject by marrying an Englishman." The rule of Muhammadan law is similar. The question of the validity of the marriage was left open. The marriage was celebrated according to the law of South Africa and the husband would hardly have dared to describe himself as a bachelor but for the repeated refusal of the South African courts to recognize the rights of a Moslem or Hindu wife. The petitioner's misfortunes were, in any case, the direct result of the judicial blindness of her country's courts.

Marriage Law, Roman Canon Law in India.—The Indian Christian

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[1] *Bhagwan Kuar* v. *Jogendra Chandra Bose*, (1903) 30 I.A. 249.

[2] (1903) 28 B. 597.

[3] *In re Jnanindra Natu Roy*, (1922) 70 I.C. 465.

[4] (1929) 53 B. 149.

Marriage Act, 1872, s. 88, expressly lays down that "nothing in that Act shall be deemed to validate any marriage which the personal law of either of the parties forbids him or her to enter into": and it is long since settled that this applies the Canon Law table of prohibited degrees with the Canon Law power of dispensation to all those Roman Catholics in India who did not either personally or through their ancestors bring with them into India the table laid down in England by statute. In *Peal* v. *Peal*[1] Lord Merrivale had before him the case contemplated by way of exception in *Lopez* v. *Lopez*,[2] namely of persons of British origin domiciled in India who had not become members of any community of non-British origin: and he held following an *obiter dictum* of Sir Arthur Wilson in that case that their personal law was English and not Canon Law.[3] In *Saldanha* v. *Saldanha*[4] the Bombay High Court held that s. 88 applies only where the objection of the Church is to the *vinculum*, not to the form, and accordingly does not forbid marriages in civil form before a marriage registrar. In *Jones* v. *Titli*[5] grave irregularities in the celebration of a marriage by a Roman Catholic priest were held to render the marriage void under ss. 4 and 5 of the Act as one not celebrated "according to the rules, rites, ceremonies, and customs" of that Church: even though evidence was given that the irregularities (which obviously called for disciplinary action by the Bishop) would not in pure Canon Law have sufficed to invalidate the marriage.

Marriage Law, Miscellaneous Cases.—*Saldanha* v. *Saldanha* is interesting on two other points: (*a*) The Indian Christian Marriage Act, 1872, applies to all persons irrespective of domicile, and consequently in this case to parties who were actually of Portuguese (Goa) descent and domicile (and presumably also nationality, though this is not clear). The Act over-rides *pro tanto* the provisions of the Treaty of Cession of Bombay, 1661. (The judges would presumably have disagreed with the *dictum* of the Madras judges *in re Muthu Reddi* queried below); (*b*) Saldanha had married one woman, a Goanese, by civil marriage and then another (a British subject and domiciliary) by religious marriage. He can be convicted of bigamy in British India; but if the law of Goa conforms to Roman Catholic standards, he may well find that wife No. 1 is his lawful wife in British India and wife No. 2 is his lawful wife in Goa.)

Dalal v. *Dalal*[6] calls attention to the fact that recent amendments of the Indian Divorce Act, IV of 1869, have made it possible for the Indian courts in suitable cases to grant all forms of matrimonial relief where one or other of the parties, husband or wife, is a Christian. A petitioner therefore, in such a case as *Ex parte Mir Anwaruddin*[7] is no longer without a remedy. *Submitted,* however, that no marriage can be validated by this alteration in the Divorce Act which would not have been valid without it. This point was not in issue.

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[1] (1930) 46 T.L.R. 645.

[2] (1885) 12 C. 706 F.B.

[3] Indian readers should note that the President uses the phrase "British subject" in a sense which is practically obsolete in India.

[4] (1929) 54 B. 288.

[5] (1933) 55 A. 185.

[6] I.L.R. 54 B. 877.

[7] [1917] 1 K.B. 634.

Stroud v. *Stroud,* 58 C. 1332. The Indian Divorce Act, IV of 1869, an Act of the Indian Legislature, as amended to date, confers jurisdiction in divorce between spouses *domiciled* in India: the Indian and Colonial Divorce Jurisdiction Act,[1] a Statute of the Imperial Parliament, confers jurisdiction "where the parties to the marriage are British subjects domiciled in England and Scotland, in any case when a court in India would have jurisdiction if the parties to the marriage were domiciled in India." Under the former a wife's petition cannot succeed except upon proof of adultery + aggravation: under the latter "the grounds shall be those on which such a divorce might be granted by the High Court in England according to the law for the time being in force in England," and simple adultery suffices. Accordingly (as well as for other reasons) it is still vital for the court to decide the questions of domicile and thereby the Act to be applied. In this case the husband's grandfather, born in England, was serving in the British Army when he died of cholera in India: the father, born in India, educated in England, had returned to India at the age of 19 and lived there ever since: he was living a settled life in India on his pension, but apparently had not abandoned the idea of returning to England to die. The husband himself was born and brought up in India and had never left it; but it was held that his domicile of origin was English (being his father's domicile on the above facts) and that he had done nothing to change it (there was indeed nothing to show that he had personally any intention one way or the other, though he clearly belonged to what is commonly called "the Anglo-Indian domiciled community"). Consequently, his domicile being English, his wife could divorce him for simple adultery.[2]

Cases on Jurisdiction.—(*a*) *Anantapadmanabhaswami* v. *Official Receiver of Secunderabad,* 60 (1933) I.A. 167, (1933) 56 M. 405 P.C., reversing *Official Receiver of Secunderabad* v. *Lakshminarayana,* (1931) 54 M. 727 and restoring the decree of the original court.

Secunderabad cantonment is not British India and its court is situated beyond the limits of British India and has no authority therein. It is established and the Civil Procedure Code and other Acts, including the Provincial Insolvency Act, 1907, are applied by authority of the Foreign Jurisdiction Act, 1890, and the Indian (Foreign Jurisdiction) Order in Council, 1902. It is therefore "established or continued by the Governor-General in Council" within the meaning of s. 2 (v) of the Civil Procedure Code, 1908, and for the purposes of that code is not a foreign court. But there is no reason to hold that the definitions of that Code should be imported into other branches of law, and therefore in the exercise of its insolvency jurisdiction the Secunderabad District Court is a foreign court. So far, all three courts were agreed; as they were also in holding that an adjudication of insolvency by the Secunderabad court had no force in British India except what was given to it by the principles of private international law. They differed in the application of those principles. Curgenven J. in first appeal held that "a vesting order passed by a foreign court is a transfer by operation of law though not of British Indian law; at any rate it is not a private transfer [s. 64 Code of Civil Procedure, 1908] and therefore has not to give way to an attachment;" but the Privy Council, agreeing with the trial court, relied upon *Galbraith* v. *Grimshaw*[1] and particularly upon the following passage from the judgment of Lord Loreburn.

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[1] 16 & 17 Geo. V, cap. 40.

[2] *Cf.* for the continuance from generation to generation of English or Scotch domicile in view of an *animus revertendi* by families who had long made India their real home, *Peal* v. *Peal,* (1930) 46 T.L.R. 645 (*obiter*) and *Grant* v. *Grant,* (1931) Sc. L.T. 180 S.C. 238.

"In each case the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he could not have it unless the bankrupt could himself have assigned it." Clearly under s. 64 Civil Procedure Code the insolvent could not have assigned to the Official Receiver property which at the date of the insolvency was already under attachment.

It should be added that the case concerns only moveables: the question of immoveable property did not arise, though both appellate courts in passing noted that a foreign insolvency does not affect immoveables. Bhashyam Ayangar (II) J. in appeal attempted to distinguish between the nature of an English garnishee order and that of an Indian attachment: of the validity of this distinction, as also on two cases upon which he relied, the Privy Council expressed considerable doubt, but reserved the point for further consideration, as it was not necessary in their view to decide it.

(*b*) *Dattatraya Krishna Kane* v. *the Secretary of State for India in Council*, (1930) 57 I.A. 318; 58 C. 570 P.C. A case on the foreign jurisdiction of the Governor-General in Council under the Foreign Jurisdiction Act, 1890, and the Indian (Foreign Jurisdiction) Order in Council, 1902; important not so much for the novelty of the law laid down which was probably familiar to most of those administering or practising it, but, as so often happens with Privy Council judgments, for the unrivalled clearness with which those principles are expressed. These principles are that the Governor-General in Council, though primarily an executive body, has authority under the statute and order above cited to legislate for territories outside British India; and that when he exercises that authority he acts as a legislature, and his action can only be called in question by showing that it is *ultra vires* the authority delegated to him (not therefore on such an allegation as breach of contract). The Berar Tenancy Law, 1921, is such legislation and is *intra vires*. On the other hand, it appears to have been held that the Berar Waste Land Rules 1865, under which leases were granted for the reclamation of waste land, were mere executive orders: but this point was not strictly necessary to the decision. A distinction is also drawn between extra-territorial legislation for British subjects based upon their allegiance, which by s. 12 of the Foreign Jurisdiction Act must not be repugnant to Acts of Parliament or rules or regulations having statutory force thereunder, and extra-territorial legislation not based upon the allegiance of the subject, to which this restriction does not apply. The great bulk of the legislation for Berar falls in the latter class, being based on the permanent lease of that territory by H.E.H. the Nizam; and *semble* will be valid accordingly as a foreign *lex loci* even in its application to British subjects.

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[1] [1910] A.C. 508.

(*c*) *Chandulal* v. *Maneklal*, (1931) 55 B. 309. A receiver appointed by a court in the Native State of Baroda in a suit for dissolution of partnership is entitled to collect debts due to the partnership in British India.

(*d*) *Sheo Tahal Ram* v. *Binaik Shukul*, (1931) 53 A. 747. A suit was decreed *ex parte* in a Native State court and the decree transferred for execution to British India for execution under the reciprocity provisions of the Civil Procedure Code. The judgment debtor was entitled to object before the British court that the Native State court has no jurisdiction over him, he being neither a subject of the State nor a resident therein: and that the decree was therefore a nullity. His right to raise this plea had not been lost by submitting to part execution, nor by taking time to pay the balance.

(*e*) *Premchand* v. *Hiralal*, (1928) 24 Nag. 95. A British Indian court cannot entertain a suit for immoveable property situated outside British India: consequently it cannot deal with such property in a suit for partition of a Hindu joint family. Without necessarily questioning the accuracy of this decision one may venture to doubt some of the arguments by which it was supported. It is not difficult to imagine a case in which the necessity for conducting what is really a single suit before two different tribunals, one in British India and one in a Native State, might make a just and equitable partition very difficult if not impossible: s. 16 Civil Procedure Code strictly construed does not, it is submitted, bear the interpretation which was placed upon it: and it is perhaps to be regretted that the court did not see its way to bring the case within the well-known rule of *Ewing* v. *Orr-Ewing*[1] and similar cases.

(*f*) *Diwansingh* v. *Muhammad Akram*, (1933) 29 Nag. 315. The Ruling Prince of an Indian Native State is not amenable to the jurisdiction of British Indian courts: and as his immunity is a personal one, the mere filing of a criminal complaint through one of his officers does not amount to submission to the jurisdiction. So much was already well-settled law. In this case an attempt was made to induce the court to issue a commission for the examination of such a Prince in his own territories on the specious plea that by issuing such a commission the court would not be attempting to exercise jurisdiction over him but merely giving him a more convenient opportunity to submit to the jurisdiction if he wished. This plea was rejected and it was decided that such a commission could not be issued without previous submission.

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[1] (1883) 9 A.C. 34, (1885) 10 A.C. 453.

(*g*) *In re Muthu Reddi*, (1930) 53 M. 1023. The French possessions in India are not " a foreign state " within the meaning of those words in the *Extradition Act.* Extradition to them is regulated solely by the Treaty of March 7, 1815, Art. IX. Therefore the British Government has the right to arrest and deliver to the Pondicherry Government a British subject on a criminal charge (theft) without judicial inquiry and without satisfying itself that there is a *prima facie* case.

It was further held that the Legislature is powerless to alter such a treaty by unilateral act ; and that in face of such a treaty municipal courts are powerless to insist on a particular procedure. [*Sed quaere* : the whole ruling appears open to considerable doubt.]

Tax Cases under Indian Income Tax Act, XI of 1922, and Straits Settlements Ordinance, No. 103 (Stamps).—Difficulties in English Private International Law on the realization of income tax usually arise on the conceptions of the residence of the person taxed. Indian cases of recent years have proceeded rather on a "real" than a "personal" basis, the Indian Act rendering liable all " profits or income arising or accruing " within the territorial limits of the tax.

(*a*) *Commissioner, Income Tax, Bombay* v. *Remington Typewriter Co. (Bombay) Ltd.*, (1931) 57 I.A., 42–55 B. 243 overruling (1928) 52 B. 726. The Remington Typewriter Co., of New York, owns all the shares in three subsidiary companies incorporated and operating in India. *Held* that the Bombay company is an agent of the American company and could be taxed in India as such, (i) on all dividends declared by it and paid to the American company (this seems obvious), (ii) on the profits made by the American company on machines manufactured in America, exported to India and sold in India to the Bombay company. These profits arose within the territorial ambit of the tax and the Bombay company as agent of the American company could be forced to pay.

(*b*) *Commissioner, Income Tax, Bombay Presidency* v. *Bombay Trust Corporation Ltd.*, (1930) 57 I.A. 49–54 B. 216 overruling (1928) 52 B. 702. A company incorporated in Hong Kong lent a large sum of money to a similar company, apparently a subsidiary, incorporated in Bombay which paid 4½ per cent. per annum interest. The question of tax on the Bombay company's dividends was not in issue but only of tax *on this interest.* It was held that this was a " profit arising within " the territorial operations of the tax : and income tax could be collected from the Bombay company as agent for the Hong Kong company.

(*c*) *In the Matter of the Lord Bishop of Lucknow*, (1932) 54 A. 223. The Bishop receives *ex officio* a gratuitous annual allowance from the Colonial Bishoprics Fund. This fund is held in London and the allowance is payable and paid in London, but paid because the payee is in British

India and fills an office there, accordingly *held* to be income which *accrued or arose in British India* and therefore taxable in British India.

(*d*) *Commissioner, Income Tax, Bombay* v. *Sarupchand*, (1931) 55 B. 231. Agents in Bombay for a company registered in Indore earned profits in Bombay, but as a matter of convenience between parties were paid in Indore. The profits and the agents' remuneration both arose within the sphere of the tax and were taxable.

(*e*) *In re Multanchand*, (1930) 58 C. 999. Assessee, an undivided Hindu family (which is a person under the Indian Income Tax Act), carried on business in Calcutta and also in a Native State. Excess of remittances received in Calcutta over remittances from Calcutta to the Native State was held to be income brought into British India. But the Calcutta office owed money to one J. K. who took payment in Cooch Behar from the Cooch Behar office. This was held *not* to be profit of the firm received constructively in British India.

(*f*) *Pondicherry Railway Company, Ltd.* v. *Commissioner, Income Tax, Madras*, (1931) 58 I.A. 239; 54 M. 691. The company is incorporated in London and owns a railway in French India, which is worked to the South Indian Railway under an agreement. The same person is agent (local manager of both companies); he resides in Trichinopoly (British India) where as agent for the S.I. Rly. he makes payments to himself as agent for the P. Rly.; and, then, in the latter capacity remits a portion of what he receives to his principals in London and the remainder on their behalf to the French Government. It was held that the whole payment received in British India, including that part of it subsequently handed over to the French Government, was a profit received in British India. The judgment (Lord Macmillan) is noticeable for lucidity and literary grace.

(*g*) *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan and others*, P.C. Appeals 46 and 62 of 1932 decided February 28, 1933. H, though not a British subject, was at the time of his death domiciled in the Colony. His large estate included *inter alia* moveables outside the Colony (principally shares in companies in the Dutch East Indies) valued at about 27 million dollars. The question was whether estate duty was payable on this. The relevant sections of the Ordinance were s. 2, containing the words "Unless there is something repugnant in the subject matter or context . . . property includes moveable and immoveable property," and s. 68 (1) containing the words "In the case of every person dying . . . there shall . . . be levied and paid upon the principal value . . . of all property which passes on the death of that person a stamp duty called 'estate duty.'" It was conceded by appellant that these provisions in spite of their express wording did not cover immoveable property outside the Colony: though the terms of their Lordships' judgment and in particular a quotation from *Blackwood* v. *the Queen*[1] suggest a doubt whether he need have made any such concession. The Privy Council held that duty must be paid in the Colony on the whole of the deceased's assets other than foreign immoveables, subject only to an allowance (provided for in the Ordinance) in respect of any similar duty which might have to be paid elsewhere in respect of property situated outside the Colony. At first sight this looks like endowing a Colonial Legislature with power to legislate with extra-territorial effect, a power which is normally outside the " peace order and good government of the territories " clause commonly to be found in the charters and Acts establishing Colonial governments. Suppose, *e.g.*, that the whole of H's estate within the Straits Settlements does not amount to the duty payable on his foreign estate ? No question of the competence of the Legislature was raised.

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[1] (1882) 8 A.C. 82.

Miscellaneous Cases.—(*a*) *Foreign Act of State.—Chunilal* v. *Chaturbhuj*, (1931) 56 B. 349, S.C. on appeal (1933), 60 I.A. 211, 57 B. 474 P.C. The Indore State by an Act of State imprisoned an Indore subject, S, and confiscated all his property. It then directed another Indore subject, C, who carried on a banking business in Indore and Bombay to pay over to it the credit standing to S in his accounts. This C being unable to do in cash did by book transfer. Next, a creditor of S attempted to attach the debt due from C and, attachment failing, sued for a declaration that C was indebted to S and that this debt was liable to attachment. He failed (i) because a British Indian court will not inquire into the legality of acts done by a foreign State against its own subjects in respect of property situate in its own territory. (ii) The *situs* of a simple contract debt is the place where the debtor is residing at the material date. Thus " as the contract between the respondent and S did not provide expressly that payment was to be made solely or primarily at Bombay or make the debt enforceable only there," although the debt in question actually appeared in the Bombay books of C where the banking account of S was kept its *situs* was Indore, where C resided.

(*b*) *Illegal Association contracting outside the jurisdiction.—Appa Dada Patil* v. *Ramkrishna Vasudev Joshi*, (1928) 53 B. 652. An unregistered association of more than twenty members, having its headquarters in British India, illegal for want of compliance with s. 4 of the Indian Companies Act, 1913, had a branch in a native state, where the said Act was not in force. *Held* that it could make a valid contract in such state, and be sued upon it in British India.[1]

(*c*) *Assignment of Foreign Judgment, requirements of foreign law not satisfied.—Muhammad Moideen* v. *Chintamani Chettiar*, (1929) 52 Mad. 503. Plaintiff sued as assignee of a Ceylon judgment. By Ceylon law the assignment was invalid without recognition by the court, which passed the judgment. No such recognition by the court had been given or asked for. *Held* that a court in British India could give judgment on the Ceylon judgment in favour of the assignee (actually the plaintiff volunteered an indemnity bond against any claims of the assignor, which was accepted, but this was not the ground of the decision.

[1] Cf. *Greenberg* v. *Cooperstein*, [1926] Ch. 657.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Suspension of the Maltese Constitution.—Admirers of democracy must regret the necessity which has after so brief a renewal brought about the suspension of responsible government in Malta. The episode illustrates the fundamental fact that responsible government is a most delicate instrument, which can be successfully operated only under conditions rarely present. It demands from those who are to operate it high qualities of restraint in the use of the wide powers granted under it, and above all loyalty to any restrictions under which it is granted. When the Imperial Government with the unhesitating approval of both houses of Parliament decided that the restoration of responsible government in the summer of 1932 should be dependent on the enactment of a constitutional provision providing that the languages to be used in the public elementary schools should be Maltese and English only,[1] there were only two courses constitutionally open to those Maltese who objected to the rule. They could have refused to operate the Constitution under the new conditions, or they could have operated it loyally, subject to a formal intimation of their views to the Imperial Government, in the hope that in due course changes might be made in the Constitution. Instead they " embarked upon measures the object of which is in effect deliberately to evade this policy." The evidence adduced by the Imperial Government is unfortunately conclusive, apart from the declaration of the Minister of Public Instruction that he was considering amending the law regarding compulsory attendance in the schools with the object of nullifying the policy of His Majesty's Government. It is a minor, though, under present circumstances, serious point that expenditure of a reckless and improvident character was being incurred, and that the island finances, which were in a sound position when taken over by the Ministry, had already been gravely prejudiced. In the circumstances it is clear that the Governor had no alternative but to dismiss the Ministry and to assume the powers accorded under s. 41 of the Letters Patent, and unfortunately it was felt necessary on November 9 to issue new legislation penalizing efforts to incite, by publication of news in the press, disaffection to the Crown and disloyalty to the sovereignty of the Crown. Before the final steps, control of the police had been made a reserved matter as contemplated in 1932, and an Ordinance had been promulgated prohibiting aliens from taking part in educational work without the sanction of the Governor. It may be feared that the facts show that responsible government is hardly suited to the conditions of Malta ; it was conceded during the period when democratic constitutions were being set up widely in Europe, and there was an imperfect realization of the implications of responsible government. The case of Newfoundland, which is dealt with elsewhere, illustrates that even in the most British of communities the essential conditions for operating responsible government may fail to be present.

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[1] See *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, p. 276.

Closer Union in the West Indies.—Singularly little has resulted from the latest of many investigations of the possibility of closer union in the West Indies.[1] The Commission was satisfied that it could not ask Trinidad and Tobago to accept any scheme for federation or union, and it is clear that no other conclusion was thinkable. When this was determined, it may be doubted if further consideration of possibilities was worth while. The Commission, however, has recommended that the Leeward Islands federation should be dissolved, and that the islands, restored to local autonomy in this way, should be grouped with the Windward Islands, which already possess that form of autonomy, into a single colony, under a Governor. The islands would then each have its own legislature, executive council and Administrator or Commissioner, enacting its own laws, controlling its own finances and managing its own affairs. But the heads of the Governments would not be representatives of the Crown, nor would they be permitted to correspond direct, as do the Windwards and Dominica, with the Colonial Office. The intermediary would be a Governor who would exercise only supervisory functions from his headquarters at St. Lucia, and would not administer the government of any island even when present therein. He would convey the royal assent to Bills, refuse assent, or reserve as under the present system. He might suggest legislation, and would have the power to declare necessary in the public interest legislation for which a majority was lacking in a legislature, in which case it would be given the force of law. His essential function would be to keep in touch by tours with the various islands and to co-ordinate efforts towards the ideal of a single colony with single interests. There would be at first no unification of services save in the case of the police and agriculture, for which a detailed scheme is suggested. A minor recommendation of a vague kind is in favour of giving all the legislatures nominated and elected members to represent the public, the former being given clear power to vote as they please without regard to the views of the Government of the day. The discussion of the advantages of nomination and election is able and sound. But it may be doubted if the main recommendations are worth carrying out. The destruction of the Leeward Islands federation is a strong step ; it is dubious whether the Crown should cease to have a permanent representative in each island as a link of Empire and a moral influence in society, and still more doubtful if a single Governor, frequently on tour, would not act as a very unsatisfactory channel of communication. It may, of course, be necessary to destroy in order to build better, but the project seems too vague and uncertain in operation to justify its adoption.

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[1] Parl. Paper, Cmd. 4383.

The House of Lords and Dominion Courts.—An interesting contribution to the discussion how far judgments of the House of Lords should be treated in Dominion courts as binding on them is afforded by the attitude of the Privy Council in the New Zealand appeals [1] as to whether sufferers in the earthquake there, who were injured through the collapse of premises on that account, could be held to be entitled to compensation on the score that the accident arose out of the employment. The decision to the contrary of the Court of Appeal of New Zealand was rejected on the score of the authority of the judgments of the House of Lords in such cases as *Thom* v. *Sinclair*, [2] and it was insisted that it was of the highest importance to accept decisions of the highest tribunals which adopt definite principles on this vexed subject. As the Court of Appeal allowed themselves to be guided by the decisions of the House of Lords, the Privy Council would desire to follow the same course. Where statutory enactments had assumed the same language in so many parts of the Empire, it was desirable that there should be uniformity of interpretation. Unhappily this is a case where, by borrowing the terms of British legislation, the Dominions have involved themselves in all the obscurities inseparable from the least satisfactory aspect of modern British law.

The Privy Council and the Court of Criminal Appeal.—In the Indian case of *Ras Behari Lal* v. *The King-Emperor* [3] the Privy Council has laid down the doctrine that a trial must be regarded as a mistrial when it was shown later that one of the jurors did not understand English, the language in which some of the evidence, the addresses of counsel, and the judge's summing up were delivered. This view inevitably involves disagreement with the decision of the Court of Criminal Appeal in *Rex* v. *Thomas* [4] that a verdict could not be upset because two of the jurors had not sufficient knowledge to understand English. Finality was a good thing but justice was a better. The view of the Privy Council, of course, does not bind the Court of Criminal Appeal, which can be bound in matters of criminal law by nothing short of a judgment of the House of Lords on appeal from that court under the special procedure laid down, and it is easy to see that the issue raises peculiar difficulties. The obvious course seems to be to impose on the court the duty of satisfying itself that the jurors have understanding of English, and then not permitting any later dispute. It would be a very serious inroad on the effectiveness of criminal jurisdiction in India, if it were to be open to jurors to sit on a jury, and then to assert that they could not follow the proceedings. Probably the difference between Indian and English conditions may explain the different points of view of the two courts, and it is perhaps unfortunate that their Lordships felt it to be necessary to criticize a court which expounds a legal system other than that of India, and not therefore strictly relevant to Indian cases.

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[1] *Brooker and Ryan* v. *Thomas Borthwick and Sons* (*Australasia*) *Ltd.*, [1933] A.C. 669.

[2] [1917] A.C. 127.

[3] 50 T.R.L. 1.

[4] [1933] 2 K.B. (C.C.A.) 489.

Provincial Legislation as to Succession Duties.—" Do legislators ever read law reports ? " is a question inevitably suggested by the decision of the Privy Council in *Alberta Provincial Treasurer* v. *Kerr.*[1] The decisions of the Judicial Committee have made it absolutely clear that a province can impose direct taxation only, and, therefore, when the Alberta Succession Duties Act, 1927, made an executor who applied for probate personally liable for the amount of the duties, with the right to exact an indemnity from the beneficiaries, it clearly exceeded the powers of that legislature, as already very fully laid down in *Cotton* v. *R.*[2] and *Burland* v. *R.*[3] Nor was there much doubt on the other issue raised. The Act sought to impose taxation on property locally situated outside the province, when passing on the death of a person domiciled in the province. Now this ran clearly contrary to the decision in *Woodruff* v. *A.-G. for Ontario*[4]—a ruling now rehabilitated—and it could only be defended if it could be brought within the doctrine of *Alleyn* v. *Barthe*,[5] which allows the taxation of property situate outside a province, if the transmission takes place within the province, *i.e.* if the universal legatee in that case was domiciled or ordinarily resident in the province. But the Act clearly taxed the property, not the transmission, and thus could not be saved on this ground. Nor, of course, could it be helped by the maxim *mobilia sequuntur personam*, which once more was adduced. It means for English courts not that the *locus* of moveable property is in the place of the decedent's domicile, but that the law to be applied in determining the succession is the law of that domicile. But it is too much to hope that the ghost is finally laid. The judgment, thus, adds nothing to the earlier authorities, and the difficult question as to what is a transmission within a province remains without further elucidation. But it seems that the recipient of a legacy in a province, whatever the domicile of the testator, might be taxed on the amount thereof in pursuance of the power of the province to impose direct taxation and to choose whatever criterion it desires for assessing the tax.[6]

The State and the Individual.—The wide power of private persons to implead governments in Australia under the Constitution is subject to certain definite limits. This has necessarily been held by the High Court,[7] when it was attempted to secure a decision thence on the right of the Commonwealth to enter into an agreement with Queensland, under which the former prohibits the importation of sugar and the latter agrees to acquire at fixed prices the sugar production of Queensland and New South Wales. It was argued for the claimant that he was injured by the raising of the cost of sugar under this arrangement, nor did the court question the injury. But it held that a private person had no *locus standi*, pointing out that it was open to the Attorney-General of any State which might feel aggrieved to initiate proceedings.

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[1] 50 T.L.R. 6.
[2] [1914] A.C. 176.
[3] [1922] 1 A.C. 215.
[4] [1908] A.C. 508.
[5] [1922] 1 A.C. 215.
[6] See *Journ. Comp. Leg.*, Third Series, vol. xiii, pt. iv, p. 280.
[7] *Anderson* v. *The Commonwealth*, 47 C.L.R. 50.

The Pension Rights of State Officers.—In *Flint* v. *The Commonwealth*[1] the High Court disposed of an issue which was certainly far from clear. It ruled that the terms of s. 84 of the Constitution, dealing with officers transferred to the service of the Commonwealth from a State, definitively stereotyped the pension and its amount cannot be varied by either Commonwealth or State legislation. Thus a pension which is calculated as directed in that section is immune from reduction by the Financial Emergency Acts of 1931 of the Commonwealth and the State alike. The result, which of course may be challenged on the merits, since there is no reason why such pensioners should escape the losses inflicted on both Commonwealth and State pensioners in general, is an interesting example of the difficulties of excessive rigidity in a Constitution and of the impossibility of foreseeing contingencies.

Commonwealth Legislation and State Parliamentary Indemnities.—It is satisfactory that the High Court in *Stuart-Robertson* v. *Lloyd*[2] found no difficulty in holding that the stipend paid to a member of a State Parliament was liable to control in the interest of creditors under the bankruptcy legislation of the Commonwealth. This marks how completely the old doctrine of the immunity of instrumentalities has vanished from the interpretation of the Constitution. Nor is there any real unfairness involved. Those who deal with a member of Parliament are entitled to suppose that, if he is permitted to exercise his functions and receive his pay, their claim to share in it should not be withdrawn from the court, which, it may safely be assumed, will give full consideration to the importance of not prohibiting the member from due discharge of his functions by assigning to creditors too great a part of his earnings.

Official Privilege.—A welcome reaction against excessive privileges to official reports is exhibited by the decision in *Gibbons* v. *Duffell*[3] that when a superior officer of the police force reports on a subordinate, while the report is privileged, its privilege does not exclude proof of actual malice. The court showed a most healthy dislike of the majority decision in *Dawkins* v. *Lord Paulet*,[4] though, as that was a case of a military officer, they were able to distinguish it easily. The justices evidently hope that it may ultimately be overruled, a course still open to the House of Lords, and probably very desirable.

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[1] 47 C.L.R. 274.

[2] 47 C.L.R. 482.

[3] 47 C.L.R. 520.

[4] (1869) L.R. 5 Q.B. 94. Cf. *Fraser* v. *Balfour*, (1918) 87 L.J.K.B. at p. 1118 *per* Lord Finlay.

Criminal Appeals.—The case of *Lawrence* v. *R.*[1] is rather a distressing reminder, as is the Indian case above referred to, of the danger of unsound convictions in the colonies and protectorates and the inadequacy of the means of preventing such miscarriages of justice. The decision here reversed was that of the full court of the Supreme Court of Nigeria on a case stated on a conviction recorded at Lagos on a trial before a judge and a special jury. There is no doubt of the high character of, and care taken by, the judges of Nigeria, yet it was found that the conviction was open to challenge on the score that the judge in summing up failed to give the jury instructions as to the onus of proof resting on the prosecution or as to the fact that the accused was entitled to any reasonable doubt. Moreover, the original sentence passed was not warranted by law, and the judge in chambers in altering it was acting without due authority. Obviously cases of mistakes can seldom be brought before the Privy Council under the present restrictions on appeals in criminal cases, and the average native in a colony or protectorate can hardly ever be able to apply for special leave. On the other hand, there are doubtless difficulties in creating effective local courts of criminal appeal without prohibitive cost. But it is plain that the ideal of complete and effective justice in criminal matters has by no means yet been attained as regards the African territories.

Canada and the Statute of Westminster.—Canada has gone quietly but effectively to work to make use of the new powers granted by the Statute. The disputed issue of extraterritorial legislation has been disposed of for good by an enactment which gives such operation to every statute of Canada enacted before December 11, 1931, which by its terms or implication was intended to have such application. Canada in fact has not suffered inconvenience from the limitation on the federation to any considerable extent, and the Act accordingly merely clears away doubts. In the case of the provinces, of course, the limitation is an essential part of the Constitution, and, as the case above cited shows, the Judicial Committee is by no means inclined to allow attempts to bring property constructively within a province so as to subject it to the control of the provincial legislature. The other important change is the cutting off formally of all appeals to the Privy Council by the Criminal Code Amendment Act of 1933, so far as criminal causes are concerned. This merely carried out the proposal which was held incompetent in the classical case of *Nadan* v. *R.*[2] But one difficulty suggests itself. The cutting off of criminal appeals in the ordinary sense of the term is simple enough, but undoubtedly the term covers cases where penalties under provincial Acts are concerned, and these raise from time to time difficult questions of constitutional law. It may thus happen that on a criminal appeal the Supreme Court of Canada may rule in one sense, while on a civil appeal the Privy Council may rule otherwise.

[1] [1933] A.C. 699.

[2] [1926] A.C. 482. Cf. Keith, *Const. Law of the British Dominions*, pp. 266, 308.

The same difficulty obtrudes itself in connexion with the efforts of the federation from time to time to enforce under the criminal law its views of its constitutional powers as in the matter of insurance control.[1] It may, of course, be held that the Supreme Court would in later causes conform its views to those of the Privy Council, but that is not necessary, and it may well be that Canada will gradually accept the importance of the principle of securing that the Supreme Court shall be the final court of appeal, as urged by such authorities as the late Mr. Justice Raney. A further step to signalize the new regime is seen in the amendment of the Canadian legislation as to shipping. Comprehensive action on that score still is held over, but Canada has legislated to terminate the evasion of the reservation to British ships of the coasting trade by the practice under which United States vessels have carried goods from Canadian ports to such ports, after a transhipment in a United States port.

The Statute and the Irish Free State.—Three measures have been adopted by the Irish Free State to give effect to the fuller autonomy recognized by the Statute. Of these the least important is Amendment No. 20, which confers on the Executive Council the power, vested by Art. 37 of the Constitution in the representative of the Crown acting on the advice of the Council, of formal recommendation of appropriations. This power of the Governor-General, of course, is purely formal, and the Free State is not an innovator, the Ceylon Constitution[2] having assigned the like power to the Board of Ministers. No. 21 deletes from the Constitution the provision in Art. 41 regarding the withholding of the assent of the Crown from Bills by the Governor-General and the power to reserve such Bills. Here again the change is formal, and is in accord with the recommendations on this hand expressly made by the Imperial Conferences of 1929 and 1930. The right of reservation, it need hardly be said, was never exercised, and after the Imperial Conference of 1926 became practically impossible of exercise. Further, under the Conference Resolution of 1930, as interpreted in 1932, the Governor-General became the nominee and agent of the Free State Government alone. Much more important is No. 22, which terminates the right of appeal which, as is well known, had never been allowed by the Free State to operate effectively.[3] This measure was prepared for by the resolution of the Imperial Conference of 1926, negating any claim of the Imperial Government to insist on the retention of the appeal against Dominion wishes, and by the resolutions of the Conferences of 1929 and 1930, implemented by the Statute, which authorizes the repeal of British Acts applicable to the Dominions. The only difficulty which could be raised as to the legitimacy of the abolition of the right of appeal disappeared with the Statute, and Canada, the model under the treaty of 1921 for the Free State Constitution, has actually anticipated the Free State in abolishing in part the appeal. While, therefore, it is true that these three measures are inconsistent [1] with the treaty of 1921, if that instrument is read as a final settlement of the relations between the United Kingdom and the Free State, stereotyping the powers of the Free State to those of Canada in 1921, the position is completely changed when the treaty is given its natural [2] application to the powers of Canada as they exist from time to time. Mr. de Valera's claim that the measures are legally and morally justified seems thus unanswerable. It is, however, important to note that the British Government has definitely adopted as in 1921 the doctrine that it is impossible to allow a republican constitution within the British Commonwealth of Nations. The decision is important, for it is the first quite definitive declaration that the Statute of Westminster cannot be read as permitting the introduction of republican institutions in a Dominion which wishes to continue part of the Commonwealth. There is, of course, nothing in the Statute apart from the preamble which actually covers the point, and it is far from free from doubt. But clearly the issue of the relations of the Free State to the Commonwealth is not yet ripe for settlement.

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[1] See *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. i, pp. 115, 116. Fresh legislation as to Dominion, British and foreign companies was passed in 1932 (22 & 23 Geo. V, cc. 46, 47).

[2] Ceylon (State Council) Order in Council, 1931, s. 57.

[3] Keith, *op. cit.* pp. 277–80.

The External Relations of the Dominions.—As was inevitable, the development of Dominion independence has evoked reluctance in foreign States to treat Dominion nationals as entitled to the benefit of British treaties when the Dominions do not accept the option given of adhering to such treaties,[3] and it will be necessary eventually for each Dominion to secure fresh treaties with the Powers. A striking example is afforded by the Convention of 1933 between Canada and France relating to the mutual rights of Canadian nationals and French citizens, and to shipping of Canadian registry and French shipping. Very sensibly this general convention is quite distinct from the new trade agreement between the two countries, the latter necessarily under present-day conditions being less permanent than the former. There are many reasons for adopting a like procedure in the case of British treaties in general.

The Union of South Africa and the Irish Free State.—It is interesting to note that the Union and the Free State in their relations have adopted a close parallel to international practice. Thus the agreement on commercial relations reached at Ottawa on August 20, 1932, was duly ratified by formal instruments of the Governments of the two Dominions, and these ratifications were sent to the High Commissioners in London with due authority to exchange them. The exchange was accordingly effected at a formal meeting, after comparison of the ratifications which were found to be in due and proper form, and the exchange was recorded in a procès-verbal signed and sealed by the High Commissioners on November 10, 1933.[1] It will be noted, not without some amusement, that even in inter-imperial relations the deliberate pace of action of international transactions seems to prevail.

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[1] Cf. Mr. Thomas's statement, House of Commons, November 14, 1933; Lord Hailsham, House of Lords, December 6, 1933. Contrast Keith, *The Scotsman*, Nov. 16 and 18, Dec. 8, 1933.

[2] Mr. Lloyd George contemporaneously adopted this view, and it was acted on in 1924 when the Free State was accorded the right of having a Washington legation, because Canada had, though it had not then exercised, the right.

[3] Keith, *Responsible Government in the Dominions* (1928), ii, 851.

[Editorial Note.—For the convenience of our readers we print a passage from Lord Hailsham's speech of December 6, in which a view as to Mr. de Valera's moral and legal justification is adopted very different from that of our learned contributor :

" It was quite true that the Government had consistently taken the view that, under the terms of the so-called Irish Treaty, it was not competent for the Irish Free State Government, without a repudiation of its honourable obligations and a disregard of the terms to which it had set its signature, unilaterally to abrogate the right of petition for special leave to appeal to his Majesty in Privy Council. That was an opinion which had been consistently stated and maintained by every British Government, of whatever political complexion, since the time when the Treaty was signed. There had been a long series of legal decisions, culminating actually with a decision of the Privy Council in a Canadian case reported in 1926, under which it had been laid down that the right of the subject to petition his Majesty for special leave to appeal was a right which could not be taken away by enactment by the Legislature of a Dominion without the express authority of the Imperial Parliament. In those circumstances the House would not be surprised to be reminded that whether it had been at the time when the Irish Free State Act was being passed, in 1922 ; whether it was when the matter was discussed in 1926 ; whether it was when the late Government were in office in 1930 ; so, throughout the tenure of office of the present Government, we had consistently stated that in our view it was plain that the Irish Free State could not, consistently with the terms of the Treaty to which it owed its inception as a Dominion, repeal that right of appeal which was expressly safeguarded by the terms of the Treaty and by the terms of Article 66 of the Constitution to which that Treaty gave rise."]

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[1] I am indebted to Mr. te Water for a copy of this instrument.

NOTES.

The Hindu Law; should it be Reformed?—The principles of Hindu law were enunciated more than three thousand years ago. It is indeed a matter of joy and pride to every Indian that Indian intellect and Indian talents had the vision and wisdom to produce a set of rules and laws for the proper conduct and guidance of Indian Society at a time when most other nations of the modern world were non-existent, or if they did exist, were barbarous or semi-barbarous and the notion of any law was remote from their minds. But splendid as was the lead that India gave to the world thanks to the genius of Manu, the mightiest of law-givers that ever trod on ancient Indian soil, and his stalwart successors, Gautama, Sankha and Parasara—and thanks also to the Vedas, Mantras and Sutras—the "uttered thoughts" of India's inspired seers, and the immemorial "usages" of the peoples of India, it is to be regretted that, judged by modern standards, the laws of India are out-of-date and primitive and are ill fitted to meet the needs and requirements of a race such as the Indian race which has progressed vigorously in every walk of life and thought during the past fifty years. The wireless, telegraph, trans-oceanic telephones, talkies and television have brought the world to India's very door. The annihilation of space and distance by means of express locomotives throughout the length and breadth of India has brought the divergent castes and communities of India incredibly closer. A keen sense of patriotism resulting in a national upheaval—and a common aim and aspiration in regard to the political, social and economic welfare of India—have made the disjointed, warring India of old, with millions of internal problems and disturbances, a solid united nation. Territorialism and communalism are slowly disappearing, and in all things that matter India's outlook on life and things to-day is world-wide compared with her erstwhile narrow and provincial outlook. India's superstitions and ignorance, her racial differences and communal animosities will all be soon things of the past, and by quick degrees—whether she likes it or not—India will be "modern" in every sense of the term, like her sister nations of the world.

The question now arises—and it is a very important question—Has Hindu law kept abreast of the strides India has made in recent times? Has the progress of Hindu law been commensurate with the growth of modern India? Is not Hindu law obsolete? The answer to these questions must necessarily depend on what the Hindu law is to-day and what India is to-day. We have seen in the foregoing paragraph that India is already modern in many respects. Can the same be said of Hindu law? Emphatically "No." The origin of Hindu law goes back to several centuries before Christ—roughly about 1280 B.C. The Hindus claim that it is mainly divine in its origin, being the revelation of inspired seers and the institutes of sages handed down by word of mouth from generation to generation. It is also human in this, that at a later stage the approved and immemorial "usages" of the people supplemented the divine law of India. It was on these lines that Manu and Yajnavalkya propounded Hindu law nearly three thousand years ago. The principles underlying them are indeed sound and even remarkable when one considers that they were the results of human thought of so early an epoch. Time has considerably altered the whole fabric of Indian society and Indian thought, and the application of Hindu law to "New India" is like putting new wine into old bottles. The Hindu is a born Conservative, and being a zealous stickler for religion he prizes the Hindu law which is based on Hindu religion as a priceless gift from God, and would sooner die than by word or deed belittle the Hindu law—to do which, according to him, would be nothing short of blasphemy. True he is himself modernized every day, but out of respect for his religion and a regard for all that is "ancient" he would rather let himself be judged by the antique law of India than allow even the slightest departure from it.

It may be asked in what respects the Hindu law as administered to-day is defective and unsuited to modern thought and requirements? This question involves a thorough discussion of the standard treatises on Hindu law, beginning with the sources right up to the recent "decided cases" and the latest legislative enactments. This is not possible here. All that can be done is to make a general statement as to a few obvious defects. The plain purpose of this article is to start a controversy over the subject of Hindu law and create an interest among the legislators, judges, politicians and students of India such as may result in the introduction of a more modern law than that which is at present in vogue.

First and foremost the Hindu law is defective in point of time. Three thousand years have made a world of difference to India, and it seems ridiculous at the present age to try to conform to the faiths and beliefs, customs and manners of centuries before Christ.

Another baffling and bewildering thing about the Hindu law is its different schools and consequent lack of uniformity. This may not have been serious in days when a province was a separate unit with no chance of contact with neighbouring provinces. Now that the provinces are all interlinked by means of rapid communication, the different schools have overlapped to such an extent that the maintenance and preservation of different schools intact, and the application of special and exclusive laws to separate and different provinces, have tended to cause confusion, increased every day by inter-racial and inter-communal marriages, immigration of peoples from one province to another, the births of new religions, the adoption of new customs and manners and the increasing change in the daily outlook on life. It is time the Bengal, Mithila, Benares, Bombay, Madras and the Punjab schools were abolished and the broad divisions under which they fall, namely the Mitakshara, Dayabhaga and Mithila, were reduced to one common uniform school to which the whole of India could easily conform without confusion.

In regard to the law of succession and inheritance, there is a great deal of confusion. The method of determining relations such as Sapindas, Sakulyas, Samanodakas, Sagotras, Samana Pravaras and Bandhus by means of what is known as the "funeral oblations" or "Pinda Theory" should be substituted by some modern principle. Hindus are gradually discarding their caste marks and most of them even giving up their daily "Pujas." The "Pindas" therefore are also sure to disappear. How is relationship then to be determined in the future? In a country like India where there are no baptismal registers to record names or ages and where parents do not record in writing the names of their own children for future reference or guidance, it is extremely difficult to trace relations up to the seventh or fourteenth degree as required by the Hindu law for purposes of inheritance, marriage, mourning or adoption, and the genealogical tree affords great scope for an ambitious adventurer or "impostor" to set up false and fictitious claims to the property of a deceased person. Such frauds, confusions and uncertainties have unquestionably made India the most litigious country in the world.

There has been no attempt to improve the lot of women either as property holders, inheritors, wives, mothers or widows. They play a passive rather than an active part, and are in many respects treated as chattels rather than as human beings.

The joint family system is to be condemned. It creates idlers in the family and discourages the enterprising by its restrictions and cautious distribution of funds for domestic or business purposes. It provides a sort of "dole" which encourages "unemployment." The young man grows up with his eyes always fixed on the "family property." It is this system which encourages the living of fifty or more members of one family in a small ill-ventilated, insanitary dwelling-place with no privacy or seclusion and with no chance for thinking, studying or developing individuality. The only "recreation" of the members consists in quarrelling over their respective shares.

The Hindu law, as we have seen, is based primarily on religion. Inasmuch as religion is not uniform in India, there are bound to be irregularities in the law which originates from it. Superstitions in many instances have assumed the garb of religion and crept into it; customs of an objectionable nature have also found their way in. Take, for instance, the question of sonship. There are fourteen kinds of sons. Son by a concubine, son born of an unmarried girl, and son born in secret are all embraced in the generous arms of Hindu law. It is not so much the morality of it that is troubling as the confusion which arises when property is "inherited." So again there are "approved" marriages and "disapproved marriages," and one of the "approved" forms of marriage consists of the giving away of the girl in lieu of fees to a bridegroom who officiates as priest in a sacrificial ceremony. Yet another "approved" form of marriage consists in the giving away of the girl by the father to a bridegroom in return for a pair of cattle! Of the "disapproved" forms of marriage which are not actually invalid two may be mentioned, namely: (1) The sale of a daughter and (2) the capture of a girl after her relatives have been killed or wounded. Polygamy, concubinage and child marriages are instances of further evils in Hindu law that must be eradicated. The prohibition of inter-racial or inter-caste marriages and the deliberate tendency to keep down the Sudras and the depressed classes are also instances of injustice that are highly to be deprecated in the Hindu law. The effect of all these, it may be noted, has been to split the Indian race into sects, castes and divisions and keep them always apart in such a manner as to make them a disunited, disjointed nation incapable of combining or uniting for the common welfare of India.

Jurists seeking to justify the existence and continuance of Hindu law have argued that Hindu law is never stationary but always advances with the times by means of legislation and decided cases. This is a poor consolation, because the legislature does not often dare to interfere with the religion or the customs and manners of the peoples of India and such interference there is, is negligible. As for "decided cases" being a source of law and a help towards modernizing the Hindu law, they have certainly helped to increase the quantity of the Hindu law but not the quality, which remains the same as in the days of Manu. The Bench have scrupulously clung to the principles inculcated by Manu and his followers, and the result is that, apart from the fact of the law being stated more clearly in "decided cases," there is no radical change so far as the law itself is concerned. The tendency of the Bench to accept the religious, customary and superstitious idiosyncrasies of Hindu law is pronounced. The cases are very numerous and are often in conflict with one another. This has helped to swell the bulk of Hindu law and has added new difficulties and made confusion worse confounded. Thus for every "decided case" that a counsel for the appellant cites before the Privy Council to substantiate a point of law, the counsel for the respondent perhaps cites two or more "cases" in support of his contention which are diametrically opposed to that quoted by the counsel for the opposite side. This shows the conflicting nature of the "decided cases" and their lack of uniformity. They are certainly no help to the judges or counsel, and if anything are a source of annoyance.

What, then, is the remedy? The Hindu law should be modernized, simplified and standardized. Purge it of all ambiguities and superstitions and customs and manners that are objectionable and let legislation be employed freely to give it a perfect form. Codify the "case law" and reduce its bulk to the absolute minimum commensurate with legal requirements. Make it more secular and less religious. Strive at uniformity all over India and abolish everything which is out-of-date and tends to retard India's progress. Perhaps a commission of legal experts can devise ways and means to draw up a scheme for modernization and standardization of Hindu law. Would it not be excellent if at the time the Supreme Court comes into being in the future Federal Constitution of India the new Hindu law is also brought into effect? There is no question that the reformation of the Hindu law is an urgent necessity, and India awaits with eagerness the advent of a modern Manu.

J. Chinna Durai.

The Hague Convention as to Conflicts of Nationality.—*L'Egypte Contemporaine* for February 1933 contains a useful article by Professor Abdel Moneim Riad of the Egyptian University in which the results of The Hague Conference of 1930 are summarized and appraised so far as they concern questions of nationality. That the Conference was in this respect a failure can hardly be denied. Post-war experience seems to show that an international conference is seldom successful unless the agreement which the conference is to proclaim exists in spirit before the conference assembles. Modern States are not, one gathers, yet prepared to sacrifice their liberty of recruiting or rejecting citizens on the altar of common convenience. The imposing list of delegates to the Conference is far more impressive than its very modest, if not exiguous, results. The rather colourless Convention, agreed to by thirty-five States, has up to the present been ratified only by Brazil (September 19, 1931), Monaco (April 27, 1931), Norway (March 16, 1931) and Sweden (July 6, 1933), and even in the case of two of these the ratification was made with reservations.

Professor Riad in his article describes the conflicts of opinion manifest among the delegates forming the first committee which dealt with Nationality. He goes conscientiously through the convention, the protocols and the recommendations, adding to his explanations useful notes as to the legislation of the leading States.

No discussion of Nationality at the present day would be complete without some reference to the nationality of married women, as to which the Convention contains several articles, and two further recommendations were also made.

It is to be remarked that the new British legislation (23 & 24 Geo. V, c. 49) is intended to give effect to the provisions of the Convention so far as they concern married women. In the first place, it destroys the unhappily stateless condition of the British woman who has married an alien and has not thereby acquired her husband's nationality; incidentally it restores British nationality to many women who have in the last few years lost it by their marriage. This provision is in accordance with Art. 8 of the Convention. In the second place, it contains provisions the purpose of which is to secure that a change in the nationality of the husband during marriage shall not involve a change in the nationality of the wife except with her consent, as is provided by Arts. 9 and 10 of the Convention.

It is to be regretted that this question of the nationality of married women should have become in some degree the sport of politics; the final result is likely to be inconvenient to all the interested parties. It is difficult to see how those desirous of securing complete equality between the sexes can be expected to refrain from asking why the children of parents of different nationality should be automatically invested with the nationality of the father. Surely the mother's nationality should be just as capable of being inherited as that of the father? On the lines which are at present being followed a grant of equality in this respect seems logical. But no one who has experience of the intricacy of the existing problems can fail to shrink from any further legal differentiation of the family.

We are inclined to suggest that some new basis should be sought for the attribution of nationality in these cases; the logical application of the principle of equality of the sexes seems destined only to lead into a legal morass. Unity of nationality within the family seems a desirable aim, though in common-law countries the desirability is less insistent than in those in which nationality serves as a basis for the application of personal law. On the assumption that such unity is desirable, could it not be attained by making the family nationality depend on the matrimonial domicile at the time of the marriage? As things stand to-day this would normally be that of the husband, but not necessarily so, and at any rate it gives no legal preference to the husband. If the matrimonial domicile were established in some country to which neither of the parties belonged, some more artificial rule would need to be adopted. In such a case either the couple would be called upon to opt, or, if they could not agree, each might have to keep his or her own nationality, but such cases would be very rare.

F. M. G.

The French Government and Comparative Law.—We have been informed of an interesting new departure on the part of the French Government. Some twenty years ago there was established in the Ministry of Justice a department concerned with foreign legislation and International law. Recently the Minister decided to appoint a certain number of foreigners as correspondents to this department, selected from among the most distinguished academic and professional jurists of their respective countries. The appointments are designed both as a recognition on the part of the French Government of the high reputation enjoyed by the correspondents and as a step towards securing the co-operation of jurists of all nations in comparative legal study. Through the medium of the persons so appointed, the Government will seek to keep itself informed of legislative and juridical movements in the countries which they represent.

We are happy to find the names of some of our learned and valued contributors among those thus esteemed by the French Government. England is represented by Sir Frederick Pollock and Professor R. W. Lee, Belgium by M. Carton de Wiart, M. Poullet and M. Destrée, China by Mr. Wang Chung Hui, Greece by M. Politis, Holland by Professor Naber, Palestine by Professor Bentwich, Spain by Professor Altamira, the United States by Dean Wigmore, Dean Pound and Professor Garner. These names and most of the others mentioned in the decree of appointment dated October 9, 1933, are well known to our readers and to all interested in comparative legal study. We tender our congratulations and express our hopes that the success of this significant action of the French Government may lead other governments to follow its enlightened example.

Moslem-Jewish Marriage.—Apparently the order of the Supreme Court of Jerusalem mentioned in the November number of this *Journal*[1] was merely an interim order calling upon the Chief Execution Officer to show cause. Cause has now been shown and the High Court has found (i) that at the time of her marriage, petitioner had already become a Moslem in accordance with the Change of Religious Community Ordinance and (ii) that when she became a Moslem there was evidence to show that she was over 18 years of age. On these findings the petition has now been dismissed and the Chief Execution Officer's order in pursuance of the Sharia Court's decree stands. The decision can hardly be regarded as satisfactory. In the first place, it is for the plaintiff who desires to invoke the aid of a special tribunal to prove strictly that the case is within the jurisdiction of the tribunal, since all such tribunals are an exception to the general equality of citizens before the law. In the present case, therefore, it was for the plaintiff's husband to show that his wife was over 18 years of age at the date of her professed conversion to Islam, and unless there was ground for supposing that the petitioner was withholding evidence, the High Court, it is respectfully submitted, was in error in holding that the burden of proof was on the lady to show that she was under that age. The evidence of age does not appear to have been of any real value on either side.

The restitution of conjugal rights is, and always has been in English law, a discretionary relief: one can only assume that the High Court felt itself precluded from exercising a discretion in the matter by the existence of the Sharia Court's decree. Fortunately, this does not end the case. It was reported that the lady, when she ran away from her husband and returned to her father, also reverted to Judaism. So long as British rule continues in Palestine, absolute religious equality must continue; and even a wife is permitted to change her religion if she pleases. She can register this change of religion in the same manner as she registered her previous profession of Islam: and the effect will be not only to deprive the Sharia Court of all jurisdiction over her, but also to dissolve the marriage, even according to the purest Muhammadan law. According to that law, apostasy terminates all civil rights: it is a *capitis deminutio* causing, according to the received opinion, immediate annulment of the marriage, even in a case where the resulting difference of religion between husband and wife would not, had it existed from the commencement of the marriage, have constituted a bar to marriage. There has been some dispute about this in the past, and Moslem doctors have maintained that the wife who apostatizes should remain under her husband's power in order that he may chastise her and bring her back to the Faith. That is a consideration which a British court could hardly accept; and in any case the view which has prevailed in Turkey is given in the *Durr ul Mukhtar*, *Bab nikah il Kafir*: p. 99 of Brij Mohan Doyal's edition and translation.

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[1] Vol. xv, pt. 4, p. 270.

S. V. FG.

Canadian Bar Association and Uniformity of Legislation.—The Proceedings of the 17th meeting of the Canadian Bar Association, which was held at Alberta, contain much good reading.

Lord Hailsham, who represented the Bench and Bar of the United Kingdom and Northern Ireland, delivered an address on the Ottawa Conference.

Among the legal addresses, special attention may be drawn to that of the President, Mr. Louis St. Laurent, K.C., on the separate legal system of the Province of Quebec, to that of Maître Olivier Jallu in which he expresses the view that it is too early to attempt to codify Private International Law, to that of Mr. F. G. T. Lucas, K.C., on Ocean Bills of Lading, and to those of Mr. Justice Ewing and Mr. O. M. Biggar, K.C., on the position of the Bench and the Bar in Canada.

Mr. Justice Ewing gives some interesting figures showing the large part played by lawyers in Canadian politics. About one-quarter of the members of the House of Commons are lawyers, and about one-third of the Senators. Mr. Biggar's remarks as to the salaries of judges in Canada as compared with those in England are extremely instructive.

From the point of view of readers of this *Journal* the Report of the Conference of Commissioners on Uniformity of Legislation in Canada and the address of their President, Mr. J. D. Falconbridge, K.C., are of particular interest. The Conference was originally created primarily to secure uniformity, so far as that is practicable, in the laws on commercial subjects. It has achieved its purpose so well that there is now no commercial subject of importance outstanding which requires the attention of the Conference. This does not mean that the whole of the commercial law has been unified, but a long step in that direction has been taken. Besides model laws on many commercial subjects which have been adopted more or less widely, the Conference has drafted model laws on (among other topics) Intestate Succession, Wills, Insurance, Legitimation and Contributory Negligence.

It is well worth notice that British Columbia, New Brunswick and Nova Scotia, all Provinces which follow the common law of England, have adopted the Model Act which in effect substitutes for the English rule as to contributory negligence the French rule followed in Quebec that if fault of the plaintiff is found to have contributed to cause the accident reduced damages may be awarded. And the new law of Ontario is to the same effect though expressed in somewhat different language.

In Canada it is well understood that complete uniformity of law throughout the Dominion is not practical. It is desirable and possible to remove differences of law which might hamper commercial dealings between Canadians of different Provinces. For a long period some Provinces were so remote from others that they had, comparatively speaking, little to do with one another. That age has gone by. Modern means of communication have linked up the different parts of that wide country. But the French system of law in the Province of Quebec is as firmly established as ever and no one dreams of attacking it. Long experience in Canada and elsewhere has demonstrated the wisdom of the rule of English law that the laws of a conquered country continue in force until they are altered by the conqueror. It is largely because of this that the French Canadians have long been a singularly loyal and law-abiding people.

F. P. W.

South American Republics.—The Institute of International Affairs have published a comprehensive investigation of the political, economic and cultural conditions prevailing in the South American countries at the small price of three shillings. This valuable survey has been prepared by Mr. Kenneth G. Grubb, whose writings on various aspects of the subject are widely known, with the assistance of the Information Department of the Institute. It provides a useful comparison of the different conditions existing in each of the Republics. As an example may be quoted the section dealing with social and labour legislation.

" Such legislation, for the most part, has been passed since 1913, and the various provisions cover many of the ideals of the more advanced labour codes of the world.[1] The difficulty, however, is to obtain the adequate fulfilment of existing laws. Uruguay has taken the lead in this direction, and the first Labour Act of June 1914 sought by every means to safeguard labour, both government and private, against accidents. Subsequent Acts took into consideration hygienic and general safety precautions as well as indemnification of the victims of preventable accidents. Uruguay was also one of the first countries to adopt the Eight-hours' Day, anticipating by four years similar action of the United

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[1] Such, for example, as : the right to organize and strike ; the eight-hour day ; minimum wage ; periodical holiday ; restrictions on labour of women and children ; sanitation and living regulations ; workmen's insurance ; liability of employers, and so forth. For details of legislation see *Legislacion Social de America Latina.* I.L.O., Geneva, 1928.

States at the International Labour Conference of Washington, 1919. The Old Age Pension Act (1919), in conjunction with that of England, is probably among the most advanced legislation of its kind in the world. Uruguay probably represents the highest degree of progress attained in labour legislation in the continent; the lowest degree is to be sought in Venezuela or Ecuador.

" On the social legislation as a whole two comments can be made. First, it has been principally concerned with industrial rather than agricultural labour. This may be due to the fact that industry has largely been controlled by foreign capital, though this does not necessarily mean that foreign enterprises have taken a lead in this field, though a great deal has been done, but rather that governments have seen an opportunity to take advantage of the situation.

" The second characteristic of modern labour legislation is that the laws are in general fragmentary and the advanced principles incorporated in some of them clash with the traditional ideas still prevailing in the minds of all except a few leaders. The new legislation has not been drawn up on a sufficiently comprehensive plan, and in most countries there is a need of a complete national reconstruction on modern scientific lines, and the development along practical lines of a public conscience."

The whole volume provides a mine of information about the Republics.

Soviet Penal Law.—Another interesting though brief article in our Egyptian contemporary is contributed by Dr. Bourkser and deals with the Soviet Penal Law. The author is clearly hostile to the present political system in Russia, but his remarks on the new orientation of penal law which has resulted from the revolution seem fair and suggestive. He points out that in the criminal law to which the so-called " capitalist " countries are accustomed offences are judged mainly from an individualist point of view and their gravity is, in general, determined by the degree to which they invade the " rights " of the individual. The Soviet State looks at crime otherwise: " Crime consists in action or non-action hurtful to society, aimed against the Soviet system and of such a character as to disturb the order established by the power of the workmen and of the peasants." The first object, therefore, of the criminal law is to protect a social order. Of course offences against the established order of society are in every State viewed with gravity, but the King's peace which our criminal law seeks to secure is a peace between man and man and it is rather as a necessary corollary to this than as a primary object that treason, unlawful assembly and the like became punishable. So again the Soviet Code places among its " fundamental principles " the rule that " where an action dangerous to society is not explicitly dealt with by special provision the limits of responsibility for it are to be determined by those provisions of the Code which are most analogous." This, as Dr. Bourkser points out, leaves the door open in such cases to the exercise of a wide discretion on the part of the judge, not merely as to the extent of the punishment but as to the choice of acts to be punished. . . . It is a denial of the principle *nullum crimen sine lege*. The grave criticism which Dr. Stallybrass has made of the decision of the Court of Criminal Appeal[1] in *R.* v. *Manley*[2] will be within the recollection of all. "Even judges are human," he said, with undoubted truth, "and in time of war or when high political passions are aroused it puts a power in the hands of our judges which *might* be unwisely used." The Soviet principle goes much farther than *R.* v. *Manley* would take us.

Is it not, however, possible that society is moving in the direction of the creation of governing authorities exercising more or less arbitrary powers in the social interest? There is, at least, a possibility that provisions such as these of the Soviet Code are not so much steps backward as omens of the future; even *R.* v. *Manley* suggests a new point of view—not necessarily a welcome one.

F. M. G.

L'Institut de Droit Comparé, Paris.—Reference has from time to time been made in these columns[3] to the invaluable study and research in the field of Comparative Law which has for some years past been pursued in certain French universities, and notably in Paris and Lyons. The *Institut de Droit Comparé* of the University of Paris has been good enough to communicate to us recently its programme of studies for the ensuing year. It is remarkably comprehensive, so much so that it is not easy to suggest any important branch in modern law which will not be studied comparatively in the course of this session. Special attention may perhaps be drawn to the courses on post-war constitutions with which M. Mirkine-Guetzévitch is charged, and that on modern Turkish law, to be given by M. Loutfy Bey.

There are no names more honoured among students of Comparative Law than those of M. Lambert of Lyons and M. Lévy-Ullmann of Paris, to whose enthusiasm, insight and learning this striking movement in France is largely due.

American Journal of International Law.—The most important contribution in the October issue is an article by Mr. John Bassett Moore, until recently a member of the Permanent Court. In this article two main points are emphasized. In the first place, Mr. Moore is concerned to expose the unsoundness of the novel doctrine first expounded by President Wilson in 1913, that the recognition of a new state or government should depend upon the legality of the methods by which it obtained power. This doctrine is shown to be in clear conflict, not only with the historic policy of the United States, but with fundamental principles of international law, and its temporary adoption by Washington has led the

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[1] In *Law Quarterly Review*, xlix, pp. 183 ff.

[2] [1933] 1 K.B. 529.

[3] *E.g. Journ. Comp. Leg.*, Third Series, vol. iv, pt. i, pp. 84 ff.; vol. v, pt. i, pp. 138 ff.

Government and the courts into a labyrinth of practical difficulties. Secondly, Mr. Moore emphasizes another truth which has also become unfashionable, namely, that the accepted principles of the law of neutrality still hold good, notwithstanding the League Covenant, the Kellogg Pact, and other efforts at the organization of "collective security." Mr. Moore's combination of profound learning with wide practical experience has long since placed him in the very front rank of international lawyers, and his reasoning should act as a valuable corrective of the vague ideas which have obtained a wholly undeserved popularity at the present time.

A short note by Professor G. G. Wilson in effect supports Mr. Moore's reasoning by citing the present war between Paraguay and Bolivia. Among the other contributions special mention should be made of an article by Mr. Grover Clark, which gives a valuable account of the English practice with regard to reprisals during the mediæval period.

H. A. S.

Two Annuals.—The continuous publication of the *Annual Register* for 174 years is a remarkable achievement. The fact that the latest volume (London: Longmans, Green & Co., 30*s.*) contains in five hundred pages a comprehensive survey of the events during the year in all the varied activities of modern life throughout the world is perhaps even a greater distinction. The editor, Mr. Epstein, has the assistance of a number of contributors upon special subjects. Even so, however, it is not an easy matter for one individual, though backed by the resources of *The Times*, to produce a comprehensive publication of this kind. An alternative method is that which for five years has been adopted in publishing *A Survey of English Law* (London: Sweet & Maxwell, 10*s.* 6*d.*). It is the joint work of the members of the Department of Law and International Studies at the London School of Economics, though each section is issued under the direction of an authority on the subject. Since the continuance of this publication now seems to be assured the *Annual Register* might reasonably consider the omission of the few pages devoted to law—too slight to be of any appreciable value. *The Annual Survey of English Law* contains statutes, subordinate legislation, case law and literature, which includes a valuable bibliography. The notes on books compiled as librarians' annotations are more suitable to a work of this kind than the rather personal reviews provided in some cases. The support accorded to this volume suggests whether the time may not be coming shortly, to which the Society of Comparative Legislation has long looked forward, when a companion volume might be prepared to give the corresponding information at least in relation to the Dominions, even if at first it is not possible to cover the Empire.

NOTICES OF BOOKS.

THE STATUTE OF WESTMINSTER.

WE have already noted one work on this important Statute,[1] but there is no doubt room for another, and in fact Mr. K. C. Wheare's treatment[2] differs considerably from that of Mr. Mahaffy. His purpose is to stress the nature of the Statute as a step in the history of the constitutional structure of the British Commonwealth, and he gives therefore such an account of the origins and development of that structure as will serve to render it easy to appreciate the grounds for the passing of the Statute and the results which it was intended to achieve. The work has been done very carefully and in full detail so far as relevant, and the author has avoided the temptation to exaggerate or to minimize the significance of the Statute. The sixth chapter (pp. 88–118) on the particular application of the Statute to each Dominion is of special value. Mr. Wheare adopts the view that the abolition of the appeal in the case of the Irish Free State is within the powers of the Free State, and supports that view on weighty grounds (pp. 115–118). He accepts naturally (p. 60), as conclusive evidence that under the treaty itself the right of appeal was implicit, the view of the Privy Council in *Performing Right Society* v. *Bray Urban District Council.*[3] At the same time it must be remembered that the Privy Council had to decide this case without the aid of arguments by the Irish Free State, and that a decision thus arrived at has not the same conclusive effect as one based on a full argument for the State. It might, for instance, have been very plausibly pointed out that the Free State had been allowed to depart from the Canadian model in having the power freely to alter the Constitution, whereas Canada has a rigid Constitution, and that the appeal in Canada arose out of the need of an external authority to decide questions between the federation and the provinces. It is regrettable that an index is lacking to complete the value of a sound and useful book.

It is interesting to compare with Mr. Wheare's views the doubts of Professor Kennedy in his lectures at Lafayette College[4] as to the wisdom of reducing the flexibility of constitutional conventions to the rigidity of formal law (p. 61). In fact we have seen in the contentions of Mr. Thomas and Mr. de Valera of December 1933, radically different views of the effect of the Statute, and the latter's challenge of the validity of the doctrine of common allegiance as the basis of the Commonwealth, a conception foreshadowed by the founders of the United States (pp. 58, 59) in the days when they still held revolution unnecessary. The importance of conflicting theories of law in the Empire is rightly emphasized; but it can hardly be that the colonists never heard of the important new coronation oath of the revolution (p. 44). Massachusetts had just been busily engaged in its long dispute to evade imperial control, and its agent in England, Increase Mather, in his efforts to secure a favourable charter must have been fully cognizant of the issues. Nor can we overlook the importance of the Act of 1650 for the reduction of those colonies which sought to defy Parliament. The third lecture contains an excellent summary of the essentials of the actual operation of the Canadian Constitution, but it seems too good to be true (p. 88) that "it is quite common for a criminal to be arrested and tried, and to begin a sentence of many years all inside forty-eight hours." There is such a thing as too much haste. In a most interesting treatment (Lect. IV) of Canadian institutions Professor Kennedy pays an extremely high compliment to the part played in the Dominion by the French Canadians (p. 128), their inestimable gift of a spiritual personality. Anglo-Saxons in Canada, we learn, have a conventional point of view, are mildly puritan, and see life in terms of material prosperity; but, despite these vital differences and despite the race mixture in the west, there is, in the author's view, "a Canadian purpose, a Canadian instinct, a Canadian destiny, a Canadian nation," a confession of faith which we are glad to share with so eminent an authority, even if concrete proof is at present lacking.

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[1] *Journ. Comp. Leg.*, Third Series, vol. xv, pt. i, p. 129.

[2] *The Statute of Westminster*, 1931. (London: Humphrey Milford; Oxford: Clarendon Press, 1933.) Pp. vii + 128. 6*s*. net.

[3] [1930] A.C. 377. See *Journ. Comp. Leg.*, Third Series, vol. xii, pt. iv, pp. 287–9.

[4] *Some Aspects of the Theories and Workings of Constitutional Law.* (New York: Macmillan, 1932.) Pp. xiv + 142. $1.50.

A. BERRIEDALE KEITH.

HISTORY OF THE AUSTRALASIAN DOMINIONS.

THE seventh and last volume of *The Cambridge History of the British Empire*[1] is published in two parts, the first dealing with Australia and the second with New Zealand. The history of the Australasian Dominions is thus happily linked but not blended. The first two chapters of Part I, on the Australasian environment and the exploration of the Pacific, serve as an introduction to both, although in the second part there is a short account of Cook's New Zealand voyages. The volume is mainly the work of local historians; in the case of Australia the two introductory chapters are the only exceptions. This has the defects of its merits. While the subject is treated with all the interest and vigour of the native chronicler, yet it results in a treatment which is internal rather than external, and therefore, in such a case, emphasizes the development of a new civilization rather than an offshoot of an old one. The tendency is perhaps inevitable. The very late development of Australasia—how many people in Europe realize that the colonization of New Zealand began only a century ago?—makes their imperial relations different from those of any other part of the Empire, except the post-war colonies. Neither knew the Old Empire; neither heard the echoes of the seventeenth-century conflict between Crown and subject; neither experienced the burning question of toleration; neither suffered from the fallacies of mercantilism or the commercial sway of the East India Company; neither knew the slavery problem or the conflict with a culture that was both alien and European, like that of the Boers. Australia was born in an age when belief in imperial destiny was at its nadir, when the Mother Country was convinced that empires were nourished only to drop off like ripe fruit from the parent tree, and New Zealand in an age when the heats of imperial controversy had died down to be rekindled a generation later by Disraeli. In some measure, the history of both Dominions is the history of an economic development, of a life-and-death struggle with economic problems, and it is inevitable that this should overshadow all other issues, imperial, constitutional, or social. It is a struggle which is self-contained rather than imperial, and must put the history of Australasia in a category inherently different from that of the Dominions which shared in the beliefs and passions of a more ancient culture.

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[1] *The Cambridge History of the British Empire*: Vol VII, Pt. I, Australia; Pt. II, New Zealand. (London: Cambridge University Press.) 30*s*. and 15*s*.

The loss of the American colonies in 1783 led Pitt to consider the establishment of convict colonies in Australia—hitherto untouched by anyone but the explorer—and with this end in view the first of such settlements was made in 1787 under the direction of Captain Phillip. The early chapters in Part I deal fully with this experiment and with the subsequent work of exploration in the interior, a difficult and laborious process owing to the inland drainage of so many rivers and the absence of marked geographical features. The scope of the whole book is encyclopædic, and selection for comment is difficult: possibly the constitutional history of the Commonwealth is of most interest to the public at home. This is described first by Mr. A. C. V. Melbourne, who raises some interesting points. He traces the growth of constitutional ideas as far as the grant of responsible government in 1850. He lays stress on the distinction between responsible government in the technical sense—which the Imperial Government was reluctant to grant—and the establishment of local self-government through ministers responsible to the legislature but acting in a merely advisory capacity to the Governor-General. The unwillingness of the Colonial Office to grant more than this was due partly to a desire to retain some control over emigration. By 1850, at any rate, the control of the Lower Houses over the executives was clear. As in the case of England this preceded the dependence of the legislature on the popular will. In the next two decades the main constitutional issue concerned the powers of the Governors, whose position gradually came to resemble that of a sovereign rather than that of a colonial governor ; that is to say, they exercised influence rather than wielded authority.

The creation of the Commonwealth—formally inaugurated in 1901—is the climax of Australian development. The proposal for a federation was mooted as early as 1849, but a reason which later on made it desirable—the uneven distribution of population—militated then against the scheme, owing to the prevalence and strength of local prejudice and conflicting economic interests. The question was not raised again until the eighties, when the tariff issue demanded its reconsideration. The final passage of the Federal Act was not marked by any serious opposition, and only two episodes retarded its progress, the temporary opposition of New South Wales and the discussion with the Imperial Government over the appellate jurisdiction of the Privy Council. This latter issue ended in a compromise by which questions involving " the limits *inter se* of the constitutional powers " of the Commonwealth and a State could not be taken to the Privy Council except with the permission of the High Court. A separate chapter deals with the application of the Federal Act, details of which are more appropriate in a legal text-book, as the writer—Sir Harrison Moore—points out. A general chapter on relations with the Imperial Government between 1855 and 1921 fulfils a useful purpose in summarizing the main political developments and ideas of the period both in Britain and the Dominions, and leads to a description of the part taken by Australia in the Great War. For the rest, the interest is chiefly local.

The establishment of early New Zealand settlements lacked the complications attendant on the convict colonies of Australia. On the other hand, the New Zealanders had unique problems presented by the Maori tribes, the clash of cultures and conflicting interests in the land, not capable of adjustment without warfare. Although the two cultures do not permit absorption, the Maori is now well provided for as regards education, and intermarriage is not unusual.

In the early history of the Dominion the influence of the Wakefield school is clearly shown. The New Zealand Company, conceived in 1825, aimed at " colonization on sound economical principles," and later, in 1831, the sale of land at less than 5*s*. an acre was prohibited, in order to prevent the labourer from becoming a landowner too easily. An agreement between the Crown and the Company was reached in 1847, but it was of an unsatisfactory nature, and deprived the Company of much of its independence.

The two remaining chapters on internal development deal with economic problems and experiments in party government. The Labour party was born of the trade depression in the seventies and eighties which followed the gold rush. The resulting Liberal–Labour legislation anticipates some measures which in England did not gain sanction until more than ten years later, such as the Old Age Pensions Scheme in 1896. Concluding chapters deal with imperial relations, the Great War, and lastly, social life and cultural development. A spontaneous culture is perhaps impossible in countries so young, so geographically distant from the oldest centres of intellectual life, and whose existence is rooted in economic impulse.

Of such volumes as these, criticism in the commonly accepted use of the word is irrelevant. They are the work of many writers; they represent a volume of learning which maintains the high standard of the whole series and which abashes the average student of history. It is unreasonable to look in them for a Gibbon or a Macaulay, or to regret their encyclopædic scheme; it must be remembered that they are books of reference rather than historical narrative with its necessary element of imaginative quality, and that as such they are a means rather than an end.

G. M. Jerred.

LOCAL GOVERNMENT.[1]

In the year 1926 Mr. Montagu Harris, an official of the Ministry of Health, published a valuable book from materials furnished by a joint inquiry into the subject of Local Government conducted by the Colonial Office, the India Office and the Foreign Office, at the request of the Royal Commission on Local Government presided over by Lord Onslow. A second edition of Mr. Harris's work, now published, includes material derived from the information gathered at the Fourth International Congress of Local Authorities held at Seville and Barcelona in 1929, and the Fifth Congress held in London in 1932. It may, therefore, fairly claim to be authoritative, and, despite changes which are still taking place, up to date, especially as the author has supplemented his official sources by correspondence with learned experts in various countries. For the most part, it is a bare record of facts, which deals mainly with the machinery of local government institutions. But the facts are clearly and succinctly stated, and well grouped; so that the reader has little difficulty in finding any information which he seeks, the more so as the book comprises an index arranged on an extremely simple tabular plan, in which the principal topics (about fifty in number) are listed in the left-hand column, while the other columns give the page references to each topic under the heads of the various countries. This index, which appears to be something of a novelty, serves, not merely its obvious and primary purpose, but a second of much value to the student of comparative law. For, by a glance at the left-hand column, followed by another along the corresponding figures in the other columns, the reader can see at once the names of the countries interested in the topic in question (*e.g.* Proportional Representation, which appears to be adopted in matters of local government in eleven of the forty countries dealt with by the book), and the pages in which it is described. It may be added that the book is printed in clear type on excellent paper.

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[1] *Local Government in Many Lands: A Comparative Study.* By G. Montagu Harris, O.B.E., M.A. (London: P. S. King & Co., 1933.) Second Edition. Pp. x + 409. 15*s.* net.

Like other writers on the subject, Mr. Harris finds some difficulty in defining it. Clearly it is not sufficient to say that local government is concerned only with "subdivisions of the area of a sovereign State"; for that definition would include, for example, the governments of England and the Indian Provinces, which are certainly not what is understood by "local government," nor does Mr. Harris attempt to deal with them. Nor, though it is, probably, true to say that all local government authorities are at the present day subordinate authorities, is that distinction sufficient[1]; for so are many governments, *e.g.* that of British India, the (Crown) Colonies of the British Empire and the African possessions of France. To an Englishman, local government is inevitably associated with local independence, *i.e.* the effective power of the residents of a local area to control their own affairs. But that is a matter of *self*-government rather than of local government; and, as a matter of fact, Mr. Harris, very usefully, includes in his survey local agencies of State governments, such as the German *Kreise* and the Swedish *Härad*. It would, in fact, be wholly impossible, in the face of the French system of local government and the other systems largely modelled upon it, to regard independence of the central authorities as an essential of local government, though, doubtless, the rarer the control of the central authorities, the more genuine the local *government*. Readers of Mr. Jennings's excellent little book on *The Principles of Local Government Law*[2] will remember his able and suggestive analysis of the difficulty, and his somewhat hesitating conclusion that the true test of local government is that it is, at least partly, carried on by means of local resources ("rates"). But this is purely an English view; there are many countries to which it would be inapplicable. And, even after stating it, Mr. Jennings feels bound to confess that "there is no scientific division of the law between local government and central government."[3] An attempt to make the distinction rest on the nature of the functions concerned seems equally hopeless; for example, some countries treat public education as a local, others as a purely central function. In short, we may confess that a definition of local government is unattainable, though most of us know local government when we see it.

Enough has already been written to indicate the width of Mr. Harris's survey. Not only does he give us particulars of most European countries (including "new" countries, such as Poland, Czechoslovakia, Latvia and Lithuania); but he discriminates, in the case of non-unitary States like the British Empire, the U.S.A. and Germany, between the local government systems of the several units, while a concluding chapter on local government in Japan carries us beyond the area of Western civilization. The only omissions of importance appear to be the cases of Portugal, Greece, Yugoslavia and Serbia. In most chapters are valuable sections on the administration of important public services, such as Finance, Public Health, Highways, Police and Education ; while, at the end of each chapter, there is a list of references to sources of information, which will be of great value to inquirers seeking further knowledge.

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[1] Perhaps to say that the powers of a local authority are always derived or delegated from or by a higher authority would be truer. But there are still a few essentially local units which claim that their powers are older than the formation of the State which now claims to control them.

[2] W. Ivor Jennings. (University of London Press, 1931.) Chapter I.

[3] *Op. cit.* p. 29.

EDWARD JENKS.

THE BULWARKS OF PEACE.[1]

THIS is a new and revised edition of a book published in 1918, before the Great War ended, and reviewed in vol. i, pt. i, of the Third Series of this *Journal.*

The preface to the original edition stated that there appeared then a disposition on the part of many generous minds to believe that the formation of a League of Nations for the purpose of preventing wars would result in the practical maintenance of general peace, and it seemed probable that a confederacy of that kind would be established at no distant date. If the new organization was to be well adapted for the fulfilment of its function, much consideration must be given to its constitution and the nature of its covenants. The author therefore set out to write what he called a Primer of Peace, that is to say, an examination of the elements of social order and a compendious statement of the material facts and guiding principles which should be borne in mind by anyone who should be considering what ought to be done by the governments and peoples of the various states of the world with the object of preventing the outbreak of wars in the future.

The primary object of the present volume is similar, the Preface describing it as being " to demonstrate as succinctly as possible the principles governing the maintenance of peace and order, and the essential elements of international jurisprudence."

That object is ably pursued. A good deal of the original edition is reproduced, but the subject is re-examined with the aid of the experience gained through the establishment and working of the League of Nations, and in the light of the international situation as existing in 1933. Besides a lucid style, and a power of economizing words, the author has a clear grasp of the principles involved, and there is little exception to be taken to most of the general propositions he lays down, although some might be disposed to quarrel with one of his conclusions, namely, that positive law cannot be made available as a means of establishing general international peace in our own time.

The new volume has the further object of examining into the main defects of the League as now existing and the nature of the changes it requires in order to provide a better security for peace. On this side the author's views are more open to criticism.

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[1] By Heber Hart, K.C., LL.D. (London : Methuen & Co., Ltd.) Pp. xxvi + 240. 7*s*. 6*d*. net.

He makes abundantly clear the necessity for better machinery for ensuring binding decisions in international disputes which depend on political considerations and cannot be peacefully settled on the basis of existing legal rights and the legal rules by which a court of justice or an arbitration tribunal is bound, and he argues convincingly that the League cannot restrain breaches of the peace or secure an effectual measure of disarmament unless it is itself equipped with organized means of applying force sufficient to overcome any opposition. He recognizes, logically enough, that unanimity in voting is irreconcilable with efficient action on the part of a body wielding executive power. His ideas of reorganization of the League appear, however, to contemplate a position of superiority and dominance for the Great Powers, which has probably little chance either of working satisfactorily or of commending itself to the world as a whole.

He maintains that there must be an Administrative Authority to secure the effective operation of the ultimate sanction of force, and competent in the last resort to determine any dispute between the states which cannot otherwise be adjusted peacefully, and that in order to be stable and efficient this Authority must "substantially and practically be mainly controlled by the Great Powers"; but that, except in the case of measures for the suppression or prevention of actual or threatened war, the decrees of the Council controlled by the Great Powers might be subject to ratification by a majority of all the states belonging to the League. He thinks that when such an Authority is constituted, and not until then, the problem of disarmament will admit of a rational solution.

He proposes that each of the Great Powers should covenant with the others that upon request of the Council it would place armed forces, not exceeding specified limits, at the disposition of the Council for giving effect to any decision of the Council in conformity with an amended Covenant of the League; that if any state should resort to war otherwise than in pursuance of a request of the Council or forcibly oppose a decision of the Council it should be the duty of the Council to call on the Great Powers to provide the necessary forces, within the specified limits, in order to defeat the war-making state or enforce the said decision. The Council is also to be entitled in any such case to require every member of the League to subject the offending state to a complete severance of economic and financial relations and intercourse.

It is not explained how oppressive or unfair treatment of the smaller Powers is to be prevented, or how the necessary measure of agreement is to be assured between the Great Powers to make such a plan workable. The author appears to see no half-way house between a position of dominating control for the Great Powers on the one hand, and on the other hand the lack of effective control likely to result from conceding an equal status to Great and Small Powers in the carrying on of a collective administration. No reference is made to any such possible alternative as a distribution of voting power upon an international body in such a way as to put the relative influence of Great and Small Powers into some reasonable proportion.

F. N. Keen.

PLEBISCITES SINCE THE WORLD WAR.[1]

The plebiscite, as a basis for drawing new frontiers in disputed territory, is a comparatively new device. In a previous publication of the Carnegie Endowment[2] Miss Wambaugh gave us a summary and analysis of popular consultations between 1791 and 1914. These had mostly been resorted to in order to justify territorial changes already decided upon.

With the War, and the emphasis that was laid on self-determination, the plebiscite came to be thought of as a means of finding a new frontier by which to divide an area between two parties according to their respective majorities. The earlier plebiscite had been practically confined to a vote as to the destiny of an existing administrative area as a whole. Miss Wambaugh has now given us a thorough and exhaustive survey of the extension of its use whereby, under the Paris peace settlement, approximately one-half of the Polish-German frontier was determined in accordance with the wishes of the population.

In the three Polish-German plebiscites, in Allenstein, Marienwerder and Upper Silesia, the vote was by "communes," *i.e.* civil parishes. The figures obtained thus provided a map on the basis of which every town or village that voted Polish could be assigned to Poland unless its transfer would involve the transfer of a larger German majority in an intervening area.

In two other areas, Schleswig and Klagenfurt, plebiscites were held by *zones*, so that again the whole area could be divided, if such a course were indicated by the vote, as in fact occurred in the case of Schleswig.

In three other areas, viz. Teschen, Vilno and Tacna-Arica, attempts have been made since the War to hold plebiscites on the same principle, with the object of dividing the area if desired; though these attempts were abandoned owing to insufficient agreement between the parties.

In the first of the two volumes under review Miss Wambaugh traces the developments which led to this extended use of the plebiscite and made it politically practicable. She then devotes a chapter to each of the official post-war plebiscites with detailed accounts of those which were abandoned and notes on sundry unilateral consultations. In conclusion, Miss Wambaugh sifts the material, compares the experience gained and outlines the precautions proved to be essential to a satisfactory plebiscite.

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[1] By Sarah Wambaugh. (Washington, 1933; Carnegie Endowment for International Peace.) 2 Vols. $5.

[2] *A Monograph on Plebiscites, with a Collection of Official Documents.* New York, 1920.

The second volume contains official documents relative to the several plebiscites, including various regulations governing the vote, decrees regulating trials for political offences, appeals, suspension of laws hitherto in force, applicability of new legislation enacted by the sovereign state, etc.

We have to thank the Carnegie Endowment for the publication of many documents of international value, but the trustees have never done a better service than in enabling these studies to be undertaken and made available. If war is, or is to be, renounced as an instrument of public policy, the various functions which it has in the past crudely and savagely fulfilled must be carried out by new and more direct procedure. In this international machinery the plebiscite will certainly have a rôle. As Miss Wambaugh says in her preface: "As long as we have democracy the plebiscite is here to stay." "Democracy cannot, however," she adds, "be served by faulty plebiscites. If we are to keep the tool we must learn how to use it. Therefore we must study those plebiscites already held so that we may discover our errors as well as perfect our technique for the future." The publication of these volumes makes it possible for the first time to judge the value and the necessary conditions of the modern plebiscite.

Two main conclusions may be drawn from a study of the material and the inferences which the author has drawn. The first is that the key to a successful plebiscite is found in the preliminary agreement under the terms of which it is to be held. Whether the agreement is forced or voluntary seems to be in practice irrelevant. If, however, it sets up a commission with insufficient authority *vis-à-vis* the contending states, insufficiently neutral in its composition, or with insufficient force at its disposal to maintain internal law and order and the freedom and fairness of the vote, then no one who has studied these documents can very well say that failure will be the fault of the commissioners or of the inhabitants or of the plebiscite as an instrument.

Apart from the neutrality of the Commission and the adequacy of its powers and of the forces under its control, the preliminary contract must also provide for: the qualifications for voting; the approximate date at which the vote is to be taken; the neutralization of the police and of the administration as far as it may affect the vote; the definition of the plebiscite area and of the zones or units into which it may be divided for purposes of the award; the constitution of the tribunal (preferably a judicial one!) by which the award is to be made and the final frontier determined.

The other conclusion is that international action of any form postulates a sense of collective responsibility. The Upper Silesian plebiscite cost £7,000,000 and involved the maintenance of foreign troops in the area over a period of two and a half years. It was essential that powers not themselves directly affected, and able to bear the cost if it became a bad debt, should police the area and defend it against external aggression or political machination. In the case of the German-Polish frontier three other great Powers were willing to shoulder the joint burden.

It must, however, be remembered that the total cost of the two and a half years in Silesia was less than the cost to Great Britain alone of one day of war in 1918: and there were perhaps three or four British casualties. Cost and the maintenance of order are not the first consideration, which is, whether the results are satisfactory. Miss Wambaugh contends that the results of the plebiscites held under the Paris peace settlement were thoroughly satisfactory since they produced contented frontiers, and a contented frontier is a settled frontier. The late Sir James Headlam Morley, who was the leading British expert on the subject, expressed a similar view.

There are many places where plebiscites should not be held because self-determination is not in the world interest, or because a perfect geographical frontier may outweigh the disadvantage of moving a small population. The great majority of the frontiers of the world follow well-defined racial divisions and need no consideration. For the remaining cases, where disputes exist and there is no paramount overruling consideration, we now have in the improved machinery of the modern plebiscite a peaceful means of lasting settlement. What Miss Wambaugh shows clearly is that the plebiscitary technique has advanced beyond the experimental stage into the calculable if still somewhat adventurous realm of international political science.

F. B. BOURDILLON.

CLASSICS OF INTERNATIONAL LAW.[1]

THE republication of the *Classics of International Law* by the Carnegie Endowment for International Peace was begun in 1906, and as the volumes succeed one another (the present work is the sixteenth in the series) it is having the important result of enabling the student to see the literary origins of International Law in a perspective which has hitherto been difficult to reach. Grotius's name is a household word even to the layman, but his prestige has certainly owed much to the accident that before he wrote the *De jure belli ac pacis* he had acquired a European reputation in fields other than that of International Law. In that subject he was one of a succession of writers, the relative importance of whose contributions may be debated, but cannot, as we have tended to assume, be authoritatively settled. Gentilis is not the only writer who has suffered from the undiscriminating adulation of Grotius. The Spanish writers in particular have suffered the same undeserved neglect.

The restoration of Gentilis to his proper place dates from the well-known inaugural lecture of the late Professor Holland in 1874, and the present volumes ought to make it more secure. It is to him more than to any other writer that we owe the separation of International Law from its matrix in theology and ethics and its establishment as a separate branch of jurisprudence. Dr. Coleman Philippson in his valuable introduction to the present republication calls him "the first great writer in *modern* International Law." That is true if we remember that his "modernity" is a matter of tendency or degree. Whether it is fair to call him a "positivist" is more doubtful; there is much to be said for the criticism which Professor Adair has directed to this view in his *Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries.* In a sense he was a forerunner of positivism, but the same might be said of other classical writers not usually classed as positivists. Probably Gentilis was not greatly interested in the speculative side of his subject, and in any case a truly positivist theory or method is a much later development.

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[1] Gentilis, *De jure belli libri tres*. (Oxford: Clarendon Press.) 2 vols. Pp. vi and 742; 52a and 479. £1 15*s*.

The present volumes contain a photographic reproduction of the edition of 1612, the introduction by Dr. Philippson already referred to, and a careful translation of the text by Professor J. C. Rolfe of the University of Pennsylvania.

J. L. Brierly.

SETTLEMENT OF INTERNATIONAL DISPUTES.[1]

Stammler has pointed out that in every international dispute the adversaries charge each other with some infringement of a rule of international law.[2] At the same time, international lawyers have called into being the doctrine of inherent limitations of international judicial process, commonly called "the doctrine of non-justiciable disputes," defined as "disputes arising out of conflict of interests" distinct from the justiciable "disputes as to rights."[3] The author submits that doctrine to a searching investigation in the light of both the theory and history of international law and comes to the conclusion that so far as that doctrine rests upon the supposed non-existence of legal rules applicable to disputes, the doctrine is contrary to generally accepted principles of positive municipal law and of general jurisprudence for which the completeness of the legal system and the prohibition of judicial *non liquet* are fundamental principles admitting of no exception (p. 134). The author, while showing "the juridical shortcomings of this doctrine," does not lose sight of one of the most important problems of judicial settlement of international disputes, namely the magnitude of the task with which international judges are confronted in solving, in the course of their judicial task of creatively applying and developing international law, the eternal antinomy between rule and discretion (p. 135). That problem is fully considered in Part III of the book. Part IV deals with the problem of reconciling, in the "field of international law, the conflicting demands of stability and change" (p. 23), which is regarded as extremely difficult in view of the absence of an international "legislature modifying or abolishing obsolete law" (p. 23). Part V gives an analysis of the conception of justiciability of disputes based on the distinction between "disputes concerning rights" and "conflicts of interest" (p. 24).

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[1] *The Function of Law in the International Community.* By H. Lauterpacht, LL.D. (London: Humphrey Milford, Oxford University Press.) Pp. xxiv + 469. 25*s.* net.

[2] *Lehrbuch der Rechtsphilosophie,* 2 Aufl. 1923, p. 149.

[3] Lauterpacht, p. 4.

Dr. Lauterpacht's book is of very great interest and value not only as an eloquent argument—based on deep knowledge of the history of international law—for the extension of international arbitration, but also as an important contribution to the analysis of the nature of international law (which the author treats as a problem of general jurisprudence) and of certain problems of legal philosophy. The author makes frequent use of the comparative method in analyzing legal conceptions. We refer for instance to his remarks on "impossibility of performance of contracts" and "unjust enrichment," where perhaps two important cases might have been usefully considered—*Sinclair* v. *Brougham*, [1914] A.C. p. 398 at p. 417 and *Cantiare San Rocco* v. *Clyde Shipbuilding and Engineering Company*, [1924] A.C. p. 226. Another example is the author's discussion of the doctrine of abuse of rights (p. 286).

V. R. IDELSON.

THE NEW JURISPRUDENCE.[1]

NOTHING that Dr. Jenks writes can fail to be of interest, and this book is no exception to the rule. The author knows what he wishes to say and he says it in clear and lucid terms—a virtue which is not found in all books on jurisprudence. His aim is to speak "in language which can be understood by the intelligent layman," for if we are to have a synthesis of the various social sciences it will be necessary for the specialists to surrender "the technical and often forbidding jargon of the schools and professions."

Whether the intelligent layman will be able to understand all the ideas discussed in this book is another question. Chapter IX, in which "occasions of the law" are defined, and the difficult *Polemis* and *Palograf* cases are analysed, is strong meat for the novice. This chapter makes us regret that Dr. Jenks has not written a full-dress book on the subject rather than this brief introduction.

Although the book is entitled *The New Jurisprudence*, the author follows the traditional order in beginning with a definition of law in general. "Law may be defined, provisionally," he says, "as the force or tendency which makes for righteousness." So-called physical laws are brought under this definition as "it is not a narrow pragmatism to assert that there is, in the physical world, a force or tendency which makes for righteousness, because the universe 'works.' . . . Happily also, in the triumphs of the architect and the engineer, the chemist and the surgeon, the farmer and the craftsman, we have such vivid examples of the benefits to be derived from a patient study of the laws of physical science, that we can feel no reasonable hesitation in attributing to such laws an overwhelming tendency towards righteousness." Although we may disagree with this definition, we cannot help admiring the robust optimism on which it is based. Similarly the four essential elements of "jurist's law" are found to be (p. 38) "(1) the desire of the nation, expressed through its chief organ, the State, to influence the conduct of persons within its jurisdiction, (ii) in a direction deemed by the nation to be 'right,' (iii) by the threat of material penalties, or, possibly, by the promise of material rewards, (iv) which sanctions will be administered by tribunals or other machinery set up by the State for the purpose." This seems to be an excellent description of an ideal law as envisaged by a nineteenth-century Liberal, but it seems hardly adequate as a definition of actual State law.

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[1] By Edward Jenks, D.C.L., Hon. D.Litt., F.B.A. (London: John Murray, 1933.) 8vo. Pp. xii + 290. 9s. net.

Perhaps the most valuable chapter in this stimulating book is the one dealing with classifications of law, a subject rarely discussed by English jurists but one on which Dr. Jenks is an expert. It is interesting to note that he includes administrative law and industrial law as separate divisions in his scheme, and that the law of obligations is divided into civil and commercial branches following the continental method.

A. L. G.

THE CONFLICT OF LAWS IN TIME.

IN the second volume of his work,[1] Professor Paul Roubier continues the elaborate and interesting investigation of the issues which concern the retroactivity or apparent retroactivity of laws. The subjects treated include obligations and contracts, property rights, capacity and family law; public law, penal law and the law of procedure; and the application of the doctrine to the principles of the conflict of laws. As his Conclusion (pp. 748–72) shows, he has seen no reason to modify the principles enunciated in his earlier volume,[2] and great credit is due to the ingenuity with which they are developed and applied to the most diverse material, without showing themselves seriously deficient. The case of contracts raises obvious difficulties. How are we to account for the fact that, while in principle a contract should be governed by the law in force at the time when it was constituted, as recently acted on in England in the case of insurance,[3] there are certain classes of cases in which existing contracts are affected by fresh legislation? The answer (pp. 109–21) that laws of public order are naturally retroactive is dismissed as unsound in principle, and obviously this is the case. Instead it is insisted that we must distinguish between laws affecting contracts and laws affecting legal status (pp. 122–52); a measure which imposes fresh burdens on lessees of premises must be regarded as affecting them not *qua* contracting parties but *qua* persons bound to contribute to the costs of administration. It is an ingenious distinction and is helpful in resolving many more complex issues, though, as inevitable in French jurisprudence, it by no means agrees with all the decisions of the courts or the reasons adduced for them. Interesting again is the author's insistence that respect of acquired rights is not the true solution of the problems discussed. This he illustrates very neatly (pp. 268–78) by a consideration of the rule of Art. 2098 (2) of the Civil Code, which in dealing with debts due to the treasury forbids the acquisition by the treasury of a fresh privilege under a law at the expense of rights duly acquired by third parties. This provision, he shows, is no mere repetition of Art. 2 of the Code, which forbids in general the retroactive interpretation of laws. It is Art. 2 which prevents the courts applying fresh privileges conferred by legislation to debts existing before the passing of the law by which they are conferred, an effect which, despite judicial authority to the contrary, could hardly be attained under Art. 2098. Not less ingenious is the mode in which the author shows that there is no element of retroactivity in the fact that a law mitigating the penalty can properly be applied to an infraction committed before it was passed (pp. 540–9). Finally we may agree (pp. 739–47) that, if a change takes place in the system of the conflict of laws applied in any country, it is not normally proper to apply it to transactions which occurred under the regime of the earlier system.

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[1] *Les Conflits de Lois dans le Temps.* (Paris: Recueil Sirey, 1933.) Pp. 816. Fr. 65.

[2] See *Journ. Comp. Leg.*, Third Series, vol. xii., pt. i., pp. 137, 138.

[3] *Ward* v. *British Oak Insurance Co.*, 48 T.L.R. 13.

A. Berriedale Keith.

NATIONALITY.[1]

This book is designed to provide students with an adequate and well-authenticated statement of the idea of Nationality current in the modern world, and of the main lines of legislation on the subject. It is published under the auspices of the Institute of Comparative Law recently established by the Faculty of Law at the University of Paris. The list of collaborators, which includes, among other distinguished names, those of MM. Mirkine-Guetzévitch, Maunier, Ancel, Basdevant and de La Pradelle, is in itself a guarantee of the high standard of the work. The subject is one of great interest and much contemporary controversy. As remarked by M. Lévy-Ullmann in his preface, it needs to be handled in an objective spirit and with great circumspection.

Acquisition and loss of nationality are matters upon which International Law is silent and International Tribunals have made few pronouncements, save occasionally as regards imposition of a new nationality *jure imperii* or as a consequence of annexation and the like. " It is for each State to determine under its own law who are its nationals," says Art. 1 of the Convention of 1930, and we agree with M. Gégout that the reference in this article to " the principles of law generally recognized," which it is there suggested limit the recognition of a foreign law of nationality, is of very small importance.

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[1] *La Nationalité dans la Science sociale et dans le droit contemporain.* (Paris : Librairie du Recueil Sirey, 1933.) Pp. 347.

May we not, however, foresee a time, not perhaps very remote, when new international understandings as to what are reasonable grounds for acquisition and loss of nationality will have been reached? It is one purpose of this book to suggest the lines of such a "natural" law of nationality, *i.e.* the rules which in the circumstances of the modern world would be most consonant with justice as holding a just balance between the claims of the State to recruit or reject citizens and the claims of the individual to choose his own allegiance.

There can be little doubt that nationality laws have been in the past and still are to a considerable extent dictated by political exigencies to the neglect of the preferences of the individual and the facts of social life. Nor can it be denied that the State is bound to consider its own needs in framing its nationality laws. M. de La Pradelle points out in his essay on *Nationality of Origin* that the preference of countries of emigration for the *jus sanguinis* is as inevitable as that of countries of immigration for the *jus soli*. But though this is so, the unfortunate phenomenon of double nationality serves to show, in some cases at any rate, that States are not inclined to give adequate influence to individual preference and the implication of social facts, just as the phenomenon of statelessness suggests that a State may be inclined to withdraw citizenship without the justification of express or implied choice. M. de La Pradelle thus conceives the spirit in which laws of nationality should be approached: "*Le seul règlement acceptable ne se peut dégager qu'en faisant apparaître, au-dessus de la notion de l'avantage de l'Etat, celle de son devoir. Il ne s'agit pas de mesurer la puissance des intérêts contradictoires en cause, mais de dire quel est, au regard de l'individu, l'Etat qui lui doit, pour répondre à son attente, sa nationalité. C'est pour l'homme que l'Etat existe—et non l'homme pour l'Etat.*"

Cases of disputed nationality are not very frequent in the English courts. Our sound adherence to the old principle of domicile usually enables us to avoid occasion for making the difficult choice between the nationality laws of various countries, a difficulty which frequently arises in other jurisdictions. These conflicts are discussed by M. Gégout of Nancy, who adopts the view that where a "national" court is called upon to decide to which of two or more competing nationalities the *de cujus* belonged, it being granted that he had not the nationality of the *forum*, the answer given should be that which harmonizes best with the facts of the life of *de cujus*, or, to use the words of Art. 5 of the Convention of 1930, he should be recognized as "having the nationality of that country with which in the circumstances he appears to be in fact most closely connected." We venture to think that this will usually, though not perhaps always, be found to be the country of his domicile, using this term in its English sense, and the fact that this is so does not encourage us to abandon the older criterion to which we have so long been faithful.

There is in the book plentiful evidence of the wide knowledge of foreign bodies of law possessed by the writers, though perhaps attention is more particularly directed to States which may be described as within the sphere of French legal influence. When discussing changes of nationality otherwise than by naturalization M. Ancel might perhaps have noticed the provisions of Art. 5 of the Palestine Citizenship Order in Council, 1925, which may be regarded as furnishing a curious example of change of nationality due to *bienfait de la loi*. The circumstances were peculiar. A number of persons, mainly Jewish immigrants, had opted for Palestinian citizenship, before such a thing existed. When such citizenship came to be officially recognized after the constitution of the Palestinian State these persons were in effect treated as having a claim to be treated as Palestinian citizens without naturalization.

No student of the problems of nationality—and these are numerous—can afford to neglect this book. It is packed with interest. One small complaint we have to make, viz. that there are a good many misprints. On page 5 a whole line is repeated. This is not up to the usual high standard of French typography.

F. M. G.

FOREIGN DECREES IN DIVORCE AND NULLITY.

THIS little book [1] contains the answers to a *questionnaire* addressed to a large number of States and administrations relative to the exercise of jurisdiction and the recognition of foreign decrees in divorce and nullity.

The International Law Association has performed a useful service in collecting and compiling this information, bearing as it does upon a subject of great importance, but of unfortunate intricacy. It is, however, to be regretted that owing, one must suppose, to the method adopted in collecting the information, it is far from complete, and the amount of information vouchsafed varies very much from State to State. Presumably the completeness of the answers to the *questionnaire* depended upon the industry and complacence of the correspondents. Thus we find that Czecho-Slovakia covers twelve pages and France eight, while an extremely valuable statement is given as to the situation in very many of the States of North America. On the other hand, there is no information as regards the Southern American States, the Balkan States or Soviet Russia, and there are other omissions. So again, within the British Empire, the only part of the British Isles dealt with is, oddly enough, the Isle of Man, as to which some very interesting particulars are given. Nothing is said as to the Union of South Africa, and the information as to some of the Crown Colonies is sometimes very meagre, and occasionally misleading. To state, for example, as to Cyprus that the High Court has the jurisdiction of the High Court in England as to dissolution or nullity or jactitation of marriage, is misleading. In Cyprus, as elsewhere in the Near East, it is the religious courts which for practical purposes exercise matrimonial jurisdiction. The omission of all mention of Egypt, Palestine, Syria, Greece, Turkey and Iraq leaves a rather serious territorial gap in this quarter of the world. On the other hand, some little-known places are treated with comparative fullness. More than two interesting pages are devoted to Sarawak, and Kenya, which is indeed less remote, has an equal amount of attention.

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[1] *Jurisdiction and Recognition in Divorce and Nullity Decrees.* Edited by William Latey for the International Law Association. (London: Sweet & Maxwell.) Pp. 111. 5s.

Half a loaf is better than no bread, however, and we are grateful to Mr. Latey and to the International Law Association for what they have done for us. We shall hope that later on the rest of the loaf will be forthcoming.

F. M. G.

EVERYDAY LAW FOR WOMEN.[1]

UNQUESTIONABLY Mrs. Normanton has put together in a convenient form a very considerable amount of useful information which otherwise would have to be sought from a variety of different sources. She has aimed at "taking an English female creature in her journey from cradle to grave upon a sort of aerial voyage over the *terrain* of her country's laws, so far as they are most likely to affect her," and a word of congratulation may well be offered on the success which she has achieved in covering the ground so completely. From the time when her reader is tempted to swing on the school gate, passing through the stage at which she finds happiness in riding pillion on a motor-cycle and the probably later stage at which she wants to know how wisely to engage a governess, to the time when she wants to bequeath property for the education of her grandchildren—on all these matters she will, if she turns to this volume, find something of enlightenment and advice.

The book suffers, perhaps, from a lack of balance in its emphasis, but it is an open question how far this fault lies in the particular compilation, and how far it must be attributed to the nature of the task attempted. It may well be argued that it is impossible to give any adequate information without making it technically detailed, but the greater the detail given, the greater the danger of encouraging a lay reader to act on her own initiative without professional advice. True, Sir Duncan Grey, in a short and useful section, deals with the relation of the lay client to the solicitor, and Mrs. Normanton advises the woman arrested on a false charge of larceny to consult a solicitor; but the book is not one to be read through, but to be used for reference, and in its present form the more general advice may well escape the casual reader altogether. This over-emphasis on detail is particularly to be noted, and deprecated as unnecessary and undesirable, in the sections dealing with unhappy marriages and with sexual relationships and crimes generally.

Whilst appreciating to the full the great utility the book may have when wisely used (though it is probable its usefulness will be greatest to those who already have some acquaintance with legal matters and procedure), it is much to be wished that Mrs. Normanton had included at least a short section explaining the legal attitude of mind, without which so much is either unintelligible or else misunderstood and, therefore, a possible source of harm. If the book is for the lay woman, would not its value have been greatly enhanced, for example, by some explanation of what the woman juror will see and hear, and what her attitude of mind should be if she fulfils her duty as a citizen and does not only turn to the book to ascertain whether there is any ground on which she can seek exemption from jury service, all of which grounds are fully set out?

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[1] By Helena Normanton, B.A., Barrister-at-law. (London: Ivor Nicholson & Watson.) Pp. xiii + 415. 5s. net.

M. G. C.

THE FOREIGN OFFICE.

THIS is a lively, entertaining and, it is perhaps needless to say, a well-written book;[1] and though the connexion between its subject and Comparative Legislation is somewhat tenuous, many readers of this *Journal* may find that the information it conveys is congenial to their interests. The first eleven chapters, which are by Sir John Tilley, recount the history of the office; while the remaining five, by Mr. Gaselee, the present librarian, expound its present organization. Perhaps the most remarkable fact which Sir John Tilley has to relate is that it was not until recently that anybody in the Foreign Office, with the exception of the Secretary of State himself, was invited or even allowed to do any work which was not in reality purely mechanical. The present system, under which first division clerks are trained from the outset of their careers to think and to take responsibility by being required to minute papers, dates only from 1905.

And who would have supposed that it would have been thought necessary, not so long ago, to send a circular to all British missions, impressing upon young diplomats that it was part of their official duty to go into society?

M. S. A.

DIPLOMATIC AND CONSULAR LAWS.

THE impecunious law faculties of our universities will be moved to envy by the appearance of these lordly volumes,[2] which are a product of the research activities of the Harvard Law School. In all countries other than the United States the cost of such a work could only be borne by the public funds, and it is not easy to visualize the British Treasury providing the necessary resources. But the value of such a work of reference cannot be appraised merely by the cost of its production. Its compilation reflects no less credit upon the learning and judgment of the editors than upon the industry of the staff which has worked under their direction. In substance we are given here the laws of every country in the world upon all matters relating to diplomatic and consular activities, as well as the appropriate administrative rules and instructions. Some measure of selection and compression has been necessary to bring the vast mass of material within reasonable compass, but the discretion which this implies has been wisely used, and all texts which relate to matters of substance are usually given *in extenso*.

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[1] *The Foreign Office.* By the Rt. Hon. Sir John Tilley, G.C.M.G.; and Stephen Gaselee, C.B.E. With an Introduction by the Rt. Hon. Sir John Simon, K.C., M.P. (London: G. P. Putnam's Sons, Ltd.) Pp. xiv + 335. 7*s*. 6*d*. net.

[2] *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries.* Edited by A. H. Feller and Manley O. Hudson. 2 vols. (Carnegie Endowment, Washington, U.S.A., 1933.) Pp. xxx + 1505. $5.00.

In the result we are given a most valuable work of reference, which obviously does not admit of detailed analysis within the limits of a short notice. But the reviewer may observe that the range is wide in time as well as in area. The British legislation printed begins with the Diplomatic Privileges Act of 1708 and ends with a section of the Finance Act of 1930. In France the legislation begins with a revolutionary decree of 1794. The reader will note with interest the efforts of the Soviet Government to reconcile the principles of a proletarian order with the practical requirements of diplomatic intercourse in a capitalist world.

H. A. S.

INTERNATIONAL ADJUDICATIONS.

THE fifth volume [1] of Mr. Moore's monumental series deals with cases arising under three American treaties, the Treaty of San Lorenzo de Real with Spain (1795) and the conventions of 1803 and 1831 with France. In each case the subject-matter consists of claims preferred by American citizens as neutrals against belligerents in the revolutionary and Napoleonic wars.

The documentation is presented with the fullness which is a feature of the series. For the international lawyer the chief interest will lie in the record of the diplomatic negotiations, for the questions of principle at issue between the States concerned were really settled by diplomatic methods rather than by the adjudications which followed them. The commissions constituted under the two conventions with France were purely American and not international. An interesting feature of the volume is the reprint of a pamphlet published in 1836 by J. K. Kane, a member of the 1831 commission, which contains an analysis of the principles applied in making the awards.

H. A. S.

COMMERCIAL LAW.

THE learned author of *Introduccion al derecho mercantil comparado* (1930) has written this book [2] in the first instance for "non-specialists," and freely admits that on more than one occasion he has sacrificed scientific precision (*el rigor scientifico*) to clarity of exposition (p. 12). For the author, *titulo de crédito* is an abstract notion (*una abstraccion de la mente*) which is applicable to an unlimited class or category of certain obligations in writing (pp. 130, 131). That notion is wider than *effets de commerce* in French Law[1] and corresponds more to the Italian idea of *titolo di crédito*[2] and to the German notion of *Wertpapiere*.[3] A *titulo de credito* is described as *obligación patrimonializada*, a relationship which implies the transfer of an economic value (*un valor economico*) from the *patrimonium* of the debtor to the creditor (p. 18). Choses in action of English law seem to us much farther from the notion of the *titulo de crédito* than the author seems to think (pp. 20–3), especially if one considers the existence of choses in action arising *ex delicto*.[4]

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[1] *International Adjudications, Ancient and Modern.* Vol. V. Edited by John Bassett Moore. (London: Humphrey Milford, Oxford University Press, 1933.) Pp. xv + 502. 14*s.* 6*d.*

[2] *Los titulos de crédito en la doctrina y en el derecho positivo.* By Augustin Vicente y Gella. (Zaragoza, 1933. Tip. La Academica de Ferderico Martinez.) Pp. 443.

The author deals in detail with some of the *titulos* only (bills of exchange and cheques), but describes their negotiation generally and in particular on the Stock Exchange. The book is based on serious study of many systems of law and will be of interest as an introduction to the comparative study of the subject.

V. R. I.

ENCYCLOPÆDIA OF MODERN CIVIL AND COMMERCIAL LAWS.

The term "encyclopædia" best indicates the character of this great enterprise[5] which is making most satisfactory progress. The first volume was reviewed in these columns in 1928 and 1929.[6] It was devoted to giving a general description of the legal system of each country with a sketch of the history of the law, an account of the principal sources and a bibliography.

Part I gave such a description of the 35 countries of Europe. No State, however small, was left out. Andorra, Monaco and San Marino have a section devoted to each of them just as much as the great Powers.

Part II dealt with 44 countries in Asia, Africa, North America, Central America and the West Indies, South America and Australia. Some idea of the scope of the work may be seen in the fact that this half-volume ran to 1016 pages in double column.

With Volume II began the treatment of legal topics in alphabetical order.

Of this dictionary part of the work three volumes have been completed and the fourth is well under way. We are now nearly half-way through Volume V, counting the introductory volume.

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[1] Lyon-Caen et Renault, *Traité de droit commercial*, 1925, vol. iv, p. 1.

[2] Vivante, *Trattato di diritto commerciale*, vol. iii, § 953.

[3] *Ein Recht verbriefende Urkunden, deren Besitz zur Ausuebung und Uebertragung des Rechts erforderlich ist.* (Dove, Handels gesetzbuch, 1925, p. 4).

[4] Strahan, *Law of Property*. Seventh ed., p. 384 note.

[5] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, herausgegeben von Dr. Franz Schlegelberger. Vol. IV and Vol. V down to Konzernrecht. (Berlin : Vahlen.)

[6] Third Series, vol. x, p. 348, and vol. xi, p. 304. Later parts of the work have been noticed when they appeared.

For a competent German scholar the work is of the greatest utility. Where else can we look for such a conspectus of the laws of the civilized world, brought together and compared in a scientific manner, and with an up-to-date bibliography at the end of each article? There is one suggestion we should like to make, which if acted upon would render the book much more useful to foreign readers. Many lawyers who can read German fairly easily do not know the terminology of German law. If such an inquirer wants to find the law of some foreign country about—let us say—"Act of God," he has no idea under what head to look for it. Even if he thinks of *vis major* or *force majeure*, he will not find it. If he knew or could think of the term *Höhere Gewalt*, he would find the whole subject admirably treated by Dr. Ernst von Caemmerer. We think the editors might do something to help such an inquirer to get on the track. It would not be difficult to frame a glossary to give him the German, French, Italian and English equivalents for at least the more important headings. In many cases these terms are mentioned in the text of the article, but what is wanted is a clue to enable the foreign reader to discover the article of which he is in search.

F. P. W.

We have also to acknowledge:[1]

The Law and the Constitution. By W. Ivor Jennings, M.A., LL.D. (London: University of London Press, Ltd.) Pp. xiv + 270. 6*s*. 6*d*. net.

Servitudes in the Law of Scotland. By T. A. Ross. (Edinburgh: W. Green & Sons, Ltd.) Pp. iv + 72. 5*s*. net.

Select Scots Cases. By A. D. Gibb. (Edinburgh: W. Green & Sons, Ltd.) Pp. xii + 135. 10*s*. net.

The Policy of the United States with respect to the League of Nations. By Clarence A. Berdahl. (London: Humphrey Milford, Oxford University Press.) Pp. 129. 8*s*. 6*d*. net.

Leading Cases in the International Private Law of Scotland. By L. Mackinnon. (Edinburgh: W. Green & Sons, Ltd.) Pp. xvi + 100. 7*s*. 6*d*. net.

Law of Scotland: Sources and Juridical Organization. By Stuart G. Kermack. (Paris: Recueil Sirey, 1933.) Pp. 53. Frs. 20.

A Manual of the Law of Extradition and Fugitive Offenders applicable to the Eastern Dependencies of the British Empire. 2nd edition. By Aloÿsius de Mello. (Singapore: Government Printing Office.) Pp. xix + 637. $17.50.

Judicial Aspects of Foreign Relations. By Louis L. Jaffe. (London: Humphrey Milford, Oxford University Press.) Pp. viii + 278. 15*s*. net.

La Democratie. By Rodolphe Laun. (Paris: Librairie Delagrave.) Pp. 227.

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[1] Mention here does not preclude a review later.

Le Pouvoir Juridique sur ce qui est au dela de la vie. By Niceto Alcala-Zamora. (Paris: Recueil Sirey.) Pp. 145. Frs. 30.

Die Zivilgesetze der Gegenwart. Bd. X. *Das Zivilrecht der nordischen Länder.* 1 Abt. *Finnland und Schweden.* Pts. I, IIIa. Ed. by Fr. Schlegelberger, Van Seth, R. A. Wrede, and H. Dix. (Mannheim: Deutsches Druck- und Verlagshaus.) Part I, RM. 14; Part IIIa, RM. 10.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Gold Coast Review; Headway; Hindustan Review; Instituto Ibero-Americano de Derecho Comparado publications; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Rapports Judiciaires de Quebec; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review; Zeitschrift für Ostrecht.

A CENTURY OF VICTORIAN LAW.

[*Contributed by* SIR W. HARRISON MOORE, K.B.E., C.M.G., LL.D.]

THE Centenary now being celebrated in the State of Victoria in the Commonwealth of Australia does not commemorate the foundation of the colony by separation from New South Wales, which was in 1851, or the foundation of the mother colony itself, which was in 1788. Various dates might be celebrated by centennial functions, for the Port Phillip District had many years of growth before it was established as the colony of Victoria, and 1834 belongs to pioneers of settlement. These first attempts at settlement are themselves legal history, for they were in part induced by a new "impounding law" in Tasmania—a subject of great importance in the distinctively colonial period—they were acts of trespass against the Crown, and punishable offences, for "trespassers will be prosecuted" was no "wooden lie" in Australia where Crown lands were concerned; and finally some of them challenged the Crown in a high matter, for they sought to found titles independently on a "treaty with the aboriginal tribes."[1] Without troubling about the competitive dates for centennial honours we may recall that s. 24 of the Australian Courts Act, 1828, provided that all laws and statutes in force in England on July 25 of that year should be applied in the administration of justice in the courts of New South Wales, so far as the same could be applied. Any year in the 1930's is near enough to that critical date to be an apt occasion for the review of a century's legal history of Victoria which the editors of this *Journal* have invited me to contribute. The Act of 1828 serves also to suggest the limits of our subject. In substance, it assimilated New South Wales to settlement colonies, with July 25, 1828, as a conventional date of foundation, and Blackstone's classical statement points to the distinction between the general law which is introduced and the institutions which the colony must provide according to its views of its needs.

The organization of government, the administration and police, the settlement and development of the public estate,[1] the social services, eleemosynary benefits and public utilities, are all legal institutions in that they have been established by and are carried on under statutes. But to take account of these, particularly in Australia, where they are peculiarly pervasive, would hardly stop anything short of a general history of the country. They are matters of law, but, as Salmond points out in general, they are hardly what we have in mind as " the law." They have, moreover, been adequately dealt with in numerous works, whose omissions serve further to indicate our subject—" legal history "—the sources, forms and methods of the law, the administration of justice, the familiar legal categories and notions—property, succession, obligation, tort, crime, family law, corporations, the course of these under the impact of new conditions, material, moral and mental : in the main, private law.

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[1] Cf. Jenks, *Government of Victoria*, c. iii.

Also, the invitation to write a paper on Victoria's legal history is not a commission to write the legal history of Victoria. Regretfully, constitutional history and law have to be laid aside with little more than a reference, though the law has become intensely technical and professional. But they are covered in accessible published works, and in a federal system to detach the constitution of a constituent State is impracticable without distortion, and to survey the federal constitution would make " Victoria " include " Australia."

It is necessary, however, to bear in mind a few facts in constitutional history. Until 1851 Victoria was the Port Phillip District of New South Wales, and her early legal history is therefore part of the history of New South Wales. Until 1855 the legislature is the Legislative Council, wholly nominee till 1842, thereafter predominantly elective, but still subject to much control from the Governor and the Colonial Office. After 1855 the Legislative Council is the upper and less powerful House in a two-chamber legislature, and responsible government relaxes and ultimately removes the control of Governor and Secretary of State over legislation. In 1901 the field of legislation is shared between the State and Commonwealth Parliaments. It must be remembered also that, in the period under review, the country passes from the very beginnings of occupation in an area practically uninhabited, to conditions comparable with those in the older countries.

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[1] Jenks's *Government of Victoria* (1891) marks the course of the old laws of land settlement and the administration of justice to 1890, and since 1898 the statutes of Victoria have year by year been included in the summary of legislation in this *Journal.*

Constitutional Landmarks.—While we omit constitutional and administrative law in general, a few *disjecta membra* must be collected. The boundary disputes with New South Wales regarding the Murray River,[1] and with South Australia regarding the correct determination of the parallel of longitude dividing the States,[2] and the case of the *Shenandoah* in which the British Government was cast in damages by the Geneva arbitrators for the negligence of the colonial authorities in regard to this confederate cruiser, came as near to "international" questions as the condition of a colony would permit. In the great constitutional crises of 1865 and 1867, where the disagreement of the chambers left the executive without the usual provision for revenue or expenditure, the taxing power of Parliament as against the mere resolution of the Legislative Assembly was vindicated in *Stevenson* v. *The Queen*,[3] and the need for Parliamentary appropriation affirmed against the substituted device of reliance on the provisions of the Crown Remedies and Liabilities Act for the satisfaction of judgments (in this case collusive judgments or judgments by default) against the Crown (*Alcock v. Fergie*).[4]

When in 1878 another rejection of the Appropriation Bill was met by the Government by the dismissal of a large number of higher public servants, the unsuccessful challenge by a dismissed county court judge was the occasion of an elaborate argument and judgment on the position of the colonial judiciary.[1] But greatest of all cases was the Chinese immigration case—*Toy v. Musgrove* [2]—which gave to Higinbotham C.J. in his dissenting judgment the opportunity of expressing and applying judicially the views as to the nature of responsible government which, as a politician, he had induced the Legislative Assembly to affirm by resolution, and which, as one gentleman to another, he had laid before the Secretary of State. The importance and interest of the case are illustrated by the fact that the arguments and judgments were published *verbatim* as a Parliamentary Paper, and that the Attorney-General was sent to represent the Government in the Privy Council.

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[1] *First*, the law of the River itself under the Separation Act of 1850, subsequently altered by 18 & 19 Vict. c. 54, s. 5: See 1 *Commonwealth Law Review*, p. 157 (1904).

Secondly, the case of Pental Island, which was before the Privy Council on a special reference at the request of the two colonies: See 20 L.Q.R. 236 (1904).

Thirdly, the question whether at material times "this nearest source of the River Murray" did not designate the northern affluent (the Murrumbidgee) and thus include within Victoria the rich Riverina. This matter, from time to time agitated in Victoria, was in 1906 submitted to counsel by the Victorian Government with results that did not encourage the institution of proceedings in the High Court: see *The Melbourne Age*, June 9 and October 8, 1906. The matter was re-opened in 1911 by the Victorian Government with a formal intimation of a claim to the territory. The opinion of the Solicitor-General of N.S.W. on this occasion contains an epitome of the facts from Imperial and Colonial records. See *N.S.W Parliamentary Papers*, 1911–12, vol. 4, p. 709.

[2] *South Australia* v. *Victoria*, (1911) 12 C.L.R. 667, [1914] A.C. 283. Extensive historical researches for the purpose of this case were made in England and Australia. They include transcripts of all proceedings in the Privy Council regarding the boundary disputes of the American Colonies. On account of the historical value of the material collected, the Crown Solicitor for Victoria allowed counsel's brief to be deposited in the Library of the University of Melbourne.

[3] (1865) 2 W.W. & a'B. 143, 176 (L). The case was cited in *Bowles* v. *Bank of England*, [1913] 1 Ch. 57.

[4] (1867) 4 W.W. & a'B. 285 (L).

Lastly, the recurring differences between the Supreme Court of Victoria and the High Court of Australia,[3] as to the relations of courts and jurisdictions including appellate jurisdiction of the Privy Council, are matters of the ordinary administration of justice, and therefore "legal" as well as constitutional history.

Laws in Force.—To determine which of the laws and statutes of England in force at the date of the foundation, actual or conventional, of a settlement colony are applicable in the colony is the peculiar task of British courts outside Great Britain, with occasional aid from the Privy Council. In sifting out that which is attributable to local, temporary or other special conditions—*jus civile*—from those rules which must be applied wherever English law is *lex terræ* —*jus gentium*—it may be claimed without extravagance that the Australian and New Zealand courts have been the chief contributors to an important field of Empire work.[4] The legislature has also from time to time taken a hand by express adoption, rejection or repeal, as, for instance, the rejection of the Usury Acts in 1834, and of the Nullum Tempus Act in 1907. Finally, the Parliament of Victoria has made a unique contribution to the subject, at the instance of Sir Leo Cussen, who, during his consolidation of the Victorian statutes in 1915, formed the opinion that the experience accumulated during nearly a century made the English statutes in force themselves ripe for something in the nature of consolidation. The result was the very interesting Imperial Acts Application Act, 1922. The explanatory memorandum and the evidence of the learned judge before the Statute Law Revision Committee [1] are rich material for systematic study of the introduction of English law in the colonies. The Act treats the British statutes prior to July 25, 1828, in four classes. The first class is based on subjects in which a number of these statutes are undoubtedly in force in Victoria, connected and mutually dependent : these are consolidated and enacted, so that their future operation is solely as statutes of the Victorian Parliament. The second class consists of British statutes not lending themselves to this consolidation, which have either been held to be in force or are probably in force ; they are enumerated chronologically and transcribed under appropriate modern subject-headings, but are not enacted—they are to have such force if any as they had in 1923, thus leaving the question of their application for judicial determination or legislative enactment. The third class consists of all other Enactments in force in England on July 25, 1828, so far as they may be in force in Victoria : these are repealed " as far as the Parliament of Victoria has authority to repeal them," a saving which, with the specific provision in s. 5 excepting Imperial statutes applied in express terms or by necessary intendment, recognizes a fourth class of statutes, *i.e.* those with paramount authority, a class unaffected, so far as the Parliament of Victoria is concerned, by the Statute of Westminster, 1931.

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[1] *R.* v. *Rogers*, (1878) 4 V.L.R. 334.

[2] (1888) 14 V.L.R. 349, [1891] A.C. 272.

[3] *Outtrim's case*, (1905) V.L.R. 463, [1907] A.C. 81 and *Baxter* v. *Commissioner of Taxation*, (1907) 4 C.L.R. 1087; and the group of cases—*Lorenzo* v. *Carey*, (1921) 29 C.L.R. 243, *Commonwealth* v. *Limerick S.S. Coy.*, (1924) 35 C.L.R. 69, *Pirrie* v. *Macfarlane*, (1925) 36 C.L.R. 170 and *Commonwealth* v. *Bardsley*, (1926) 37 C.L.R. 393. See *The Cambridge History of the British Empire*, vol. vii (Australia), pp. 482–3.

[4] Of the 300 cases in Legge's *Selections of Supreme Court Cases in New South Wales*, 1825–1862, between a quarter and a third involve the question of the application of English law.

While English statutes later than July 25, 1828, were in force only in the rare cases in which the British Parliament enacted them for the colony or in the cases in which they were adopted by the local legislature, a close association with English law has been maintained. Whether we regard the judiciary or the legislature, we should get matters out of perspective if we concentrated attention on the departures of Australian or Victorian law from the law of England. The era of active law reform, just begun in 1828, was all in the direction which Australian conditions, including conditions of thought, demanded ; the English statutes embodied the necessary technique, and the pace was hot enough to satisfy colonists deeply engaged in other tasks. Law reform was therefore not a breach but a further link with English law. What was true of those reforms that were a clearance of the lumber rooms of the law, was substantially true also of the legislation representing liberalism of opinion or liberality of sentiment, or providing for commercial developments, *e.g.* insolvency and companies. In early days the examination of current English legislation and the presentation for adoption of approved statutes was part of the regular work of the colonial law officers, who sometimes followed the model with embarrassing fidelity, as where any part of the United Kingdom was declared not to be "beyond the seas." The distinctive colonial legislation was the social and economic development and administration connected therewith. The attainment of responsible government and the increase of political pressures merely emphasized this, and "law reform" was not expressed in experiments or new departures, but was rather squeezed out as matter upon which no political credit was to be gained.[1] Various suggestions for preventing the accumulations of "arrears of borrowing" were made, among them that the Government should make use of the greater leisure of the Legislative Council, and introduce annually "as of course" Bills for the adoption of appropriate current English statutes. It may have been thought that the appointment of a permanent Parliamentary draftsman in 1883 would facilitate this. From time to time, as in some of the consolidations, active steps were taken, and between 1902 and 1917, when he became Speaker of the Legislative Assembly, Sir John Mackey both as a Minister and a private member did a great deal to bring the law of property up to date. But when all is said of arrears, the debt of Victorian to English legislation may be judged from the fact that a table published in 1925 shows that to the end of 1924 there had been adopted in whole or in part about 430 British statutes, and of these over 50 were statutes passed at Westminster after the accession of Edward VII.

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[1] These are published with the Act in a separate volume of the Victorian statutes.

Adoption of English Common Law.—Unlike the statute law, common law and equity are not dated, and they are less likely to be referable to peculiar conditions in England or excluded by special conditions in the colony. In respect of them, as in the interpretation of that part of the statute law which is identical in both countries, while the Victorian courts have never abdicated the function of determining what was the English law,[2] the prevailing practice is expressed in a recent judgment of the High Court of Australia.[1] "In this Court we are not bound by the decisions of the Court of Appeal. But uniformity of decisions upon the law of property in force both in England and in Australia is paramount. It is a sufficient reason for reconsidering *Hunt* v. *Korn*[2] that the Court of Appeal has acted on a different rule of law. Unless some manifest error appears in a decision of the Court of Appeal, this Court will render the most abiding service to the community if it accepts that Court's decision, particularly in relation to such subjects as the law of property, the law of contract, and the mercantile law, as a correct statement of the law of England until some superior authority has spoken."[3] The superior authority—for Australia, the Privy Council—indeed has not always promoted uniformity. In particular in two Victorian cases—*Victorian Railway Commissioners* v. *Coultas*[4] and *Marshall* v. *Colonial Bank of Australasia*[5]—it is the decision of the Victorian Court which accords with the most recent English authorities, and the law as laid down by the Privy Council in Coultas's case has been altered by the Wrongs Act, 1932, in accordance with the English decisions. In the construction of the federal constitution, the competition of British and American principles and methods, the Supreme Court of Victoria and the Privy Council were at one in the preference for the doctrines applied by the Privy Council to the Canadian constitution, and it was the High Court of Australia that for many years went after strange gods.[6]

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[1] Cf. Millard, *Real Property Law of New South Wales*, p. 6.

[2] *E.g.* *R.* v. *Hyland*, (1898) 24 V.L.R. 101: the Full Court of six judges was equally divided on the question whether in the interpretation of an English statute adopted in Victoria the Court should follow *R.* v. *Hillman*, 9 Cox 386 and *R.* v. *Titley*, 14 Cox 502, cases decided in England before the adoption of the statute in Victoria. All but one of the judges thought the English cases were wrongly decided. In the New Zealand case *R.* v. *Scully*, (1903) 23 N.Z.L.R. 380 the Full Court thought that whatever their opinions they ought to follow *R.* v. *Hillman*.

Attempts to make the unenacted law—common law or equity—yield to special conditions in the colony have met with little judicial encouragement. Notwithstanding the lead given in the United States on water rights in the arid States, the Supreme Court of Victoria refused to accept the argument that the English law of watercourses had little application in Australia.[1] Extensive changes have been made by statute, in view, amongst other things, of irrigation, and a comprehensive Water Act was passed in 1905.[2] The speculative nature of the gold-mining industry was not allowed to oust the rule " once a mortgage always a mortgage " and create a new rule for this species of property, though in the particular case the merits appeared to be strongly against the mortgagor.[3] " Timber " has raised some questions in a land " where trees are superabundant and not of value as at home," [4] and where the timber trees of England are not indigenous ; but the questions have been questions of the interpretations of covenants and therefore referable to the intention of the parties.[5]

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[1] *Sexby* v. *Horn*, (1926) 38 C.L.R. 240, 245 per Knox C.J. and Starke J.

[2] (1917) 24 C.L.R. 1.

[3] The Court overruled its own decision in *Hunt* v. *Korn* and followed *Morrish* v. *Bostock*, [1921] 2 Ch. 649. See also *Trimble* v. *Hill*, (1879) 5 A.C. 342.

[4] (1888) 13 A.C. 222. "Can no longer be treated as a decision of guiding authority"—*Coyle* (*or Brown*) v. *John Watson Ltd.*, [1915] A.C. 1, 13 (H.L.).

[5] [1906] A.C. 559. Cf. *London Joint Stock Bank* v. *Macmillan*, [1918] A.C 777 (H.L.).

[6] Cf. *Wollaston's case*, (1902) 28 V.L.R. 357 and *Webb* v. *Outtrim*, [1907] A.C. 91 with *D'Emden* v. *Pedder*, (1904) 1 C.L.R. 91, *Deakin* v. *Webb*, (1904) 1 C.L.R. 585, *Baxter* v. *Commissioners of Taxation and Flint* v. *Webb*, (1907) 4 C.L.R. 1087 and 1178. In 1920 the High Court repudiated the American doctrine and overruled those of its earlier decisions that depended on it—*The Engineers' Case*, 28 C.L.R. 129.

English and Victorian Uniformity.—The course of the courts has been to stand by the established rule of English law, and let the legislature provide for special conditions arising in the colony.[6] The anxiety to preserve uniformity has not been a fondness for tradition or for symmetry, nor is it to be attributed to " imported judges," for the Victorian judiciary has without exception consisted of men whose career at the Bar was in Australia. It has been in the main a conviction that uniformity meant increased certainty, and this conviction has not been confined to the judiciary. The Companies Acts are an epitome of the reasons for fidelity to English law. The Victorian Act of 1864 was substantially the English Act of 1862 and remained in general unaltered until 1896, when the practices revealed after the " crash " of 1893 stimulated the Government to press ahead with a new Companies Act. This was partly based upon an English Draft Bill, but contained much new matter of a drastic kind. In England the Draft Bill was abandoned, and after amendments in 1900 and 1907 a Consolidation Act was passed in 1908. The Victorian and the English law were out of accord, and in 1910 the Act of 1896 was dropped and the English Act of 1908 substantially adopted. It was recognized that English experience must be richer and more complete, even in the varieties of iniquity, than Victorian, and it was therefore a safer basis for the generalizations of legislation. Of that experience, the English

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[1] (1899) 25 V.L.R. 464. Cf. *Garibaldi Coy.* v. *Craven's New Chum Coy.*, (1884) 10 V.L.R. 233 (L).

[2] See *Journ. Comp. Leg.*, New Series, vol. vii, p. 453.

[3] *Niemann* v. *Weller*, (1866) 3 W.W. and a'B. 125 (E.).

[4] *Brooks* v. *Bedford*, (1856) 1 V.L.T. 101.

[5] *Bruce* v. *Atkins*, (1861) 1 W. & W. 141 (E.) ; *Campbell* v. *Kerr*, (1886) 12 V.L.R. 384.

[6] E.g. *Taylor* v. *Sutherland*, (1847) 2 a'Beckett's Judgments 43.

Act was the expert technical expression. But more than that—uniformity would give to Victoria the guidance of English decisions and English textbooks on the Act, and would continuously furnish precedents and illustrations. Divergence would mean uncertainty, diminishing only as costly litigation settled the law, and even then textbooks on Victorian law must be rare and costly adventures.[1] This has a wider significance. The conviction of the importance of access to decisions and to textbooks of repute has been strong among those who have learnt by experience that formal expression in abstract terms is inadequate for the full expression and the knowledge of the law; that access to a wide range of experience in its application and operation is vital, and that this the narrow limits of a small community cannot furnish.

Consolidation.—The zeal of nineteenth-century liberalism for the form of the law, the search for certainty and simplification, was represented in Victoria by the pursuit of the consolidation of statutes and an effort at codification. The outstanding feature of the Victorian statute law as a whole has been its periodical consolidation. This was instituted in 1864 by Mr. Higinbotham, when Attorney-General, as a plan for systematic revision and reissue at brief intervals. The realization has fallen far short of the aim, for the consolidation of 1864–5 had not its successor until 1890, when Higinbotham C.J. planned and carried out a new consolidation. The later consolidations of 1915 and 1928–9 were the work of Sir Leo Cussen J. The several consolidations differ somewhat in character. In 1864–5 the opportunity was taken to make some amendments; in 1890 the method was rigid adherence to the law with no attempt at substantial or even formal alterations except for the correction of inaccuracy or of inconsistency arising from obvious mistake. The 1915 consolidation has been described in this *Journal.*[2] Both in 1915 and in 1928 Sir Leo Cussen made consolidation the occasion for revision; anomalies, inconsistencies and differences without reason were removed, and procedure in various cases was modernized. In 1928 the amendments of the law (which were considerable and included the adoption of some recent English legislation) were passed separately and incorporated in the appropriate consolidation

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[1] When the general consolidation of statutes was pending in 1928–9, the consolidating Companies Act in Great Britain was passed, and in view of the importance of uniformity the Parliamentary Committee in Victoria proposed that an adaptation of the British Act should be made in substitution for the Bill prepared. This intention was abandoned as it would have delayed the issue of the body of statutes.

[2] *Journ. Comp. Leg.*, New Series, vol. xvi, p. 220 (1916).

Act. A much-belated index, which should accompany any consolidation of the nature of that of 1928, is only now in preparation.

An Effort at Codification.—More ambitious was the general codification which was before Parliament in 1887–8, and which Higinbotham C.J. desired to associate with the centenary year 1888. It was the outcome of a design formed at least as early as 1870 by Dr. W. E. Hearn, Dean of the Faculty of Law in the University of Melbourne, the well-known author of *The Government of England* and *The Aryan Household*. The Draft Code submitted to Parliament in 1885 was in the main his work. A prefatory note explained that the subject-matter was " the substantive general law," " all the law, both common law and statute, in which the whole public are directly concerned, and nothing else." It omitted, therefore, the adjective law of procedure, and the law affecting particular classes of persons. The common law, so far as not declared or repealed in the code, was to continue to exist. The inspiration of the code was the jurisprudence of Bentham and Austin, and its form the application of the analytical method to English law, with, however, a distinctive feature of its own—the arrangement was essentially a classification of duties as against Austin's classification of rights. Failure to realize the significance of " absolute duties " was in Hearn's view the most serious defect in Austin's work considered either in relation to legal analysis in general, or as a system for the expression of any particular body of law : his reasons are set out in his own textbook of Jurisprudence, *Legal Duties and Rights*, a sort of *avant projet* published in 1883.[1] In 1887 a Joint Committee of both Houses took evidence on the Bill. The code was blessed by Higinbotham C.J., less, however, for its own merits than as a recognition of the systematic and orderly exposition of knowledge, which the Chief Justice was ready to extend beyond the law—" if a code of general knowledge were adopted and recognized by authority, and provision was made for its constant revision and improvement, there would be in time a great revolution in all our schools, and colleges and universities," a singular authoritarian profession by the great Liberal. The Committee recommended the enactment of the code, and the Government had to consider what it would do. A case for the opinion of eminent counsel in England on the merits of the draft code as a whole, with a fee of 300 guineas, was discouraged by Messrs. Freshfield, and it was determined to test the whole by the submission of selected parts to Victorian counsel experienced in those departments of law. Another Joint Committee in 1888 heard their rather discouraging reports and further critical comments. Mr. H. B. Higgins,[1] leader of the Equity Bar, found the code vague to the point of uncertainty in its general propositions and inaccurate in particulars. A'Beckett J., after an examination of some of the provisions in the law of property, considered that " it put in an attempted scientific shape matters which, while intelligible in the source from which they were taken, were unintelligible in the shape in which they found themselves in the code." Its common law and criminal law came in for sharp criticism also. Holroyd J. declared that the code presented " an entirely new classification, a new set of maxims or general propositions, a new nomenclature." Some members of the Committee still thought that with all its imperfections, the new uncertainties and possible dislocation of rights, the ultimate gain might be worth the temporary sacrifice, and a *via media* was offered whereby the code should, during some uncertain period, be taken to be the law in any matter until its inaccuracy should be established, in which case a court should be entitled to refer to the common and statute law unless the same were expressly repealed. But the majority was convinced that the present sacrifice was more certain than the remote gain, and for the present abandoned codification for consolidation of statutes ; the result was the consolidation of 1890. Apart from the specific defects arising from the draft being too exclusively the work of one man, the inadequate revision not informed by practical experience and a certain failure of technique in actual drafting, the case illustrated the truth that a classification and method logical for law in the abstract and, like the old common law pleading, valuable as a mental discipline in particular relations, may be inapt for the statement of a particular system of law, with its established departments, relations and notions. It became clear to the " practical man " that the code was not a journey's end but a new adventure on an uncharted sea.

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[1] Hearn's views are discussed by Professor Jenks, his successor in the Melbourne Chair of Law, in his recent work *The New Jurisprudence*. Dr. Hearn died between the session of 1887 and that of 1888.

The Judicature.—The administration of civil justice begins with a single Supreme Court for New South Wales containing within itself the jurisdiction of all the superior courts, and when in 1841 a member of that Court was made Resident Judge for Port Phillip all this was concentrated in one man. The first experience of Port Phillip in its own judge was unhappy, for Mr. Justice Willis made troubles which in the opinion of the Privy Council were good cause to justify his amotion from office by the Governor: his appeal is probably the first case affecting Port Phillip to reach the Privy Council.[1] A distinct Supreme Court for Victoria, with like jurisdiction, was established in 1852 after the separation from New South Wales. Neither in New South Wales nor in Victoria was the single court allowed to anticipate the changes effected in England by the Judicature Act of 1873, and the assimilation of law and equity went through the same process of gradualness, culminating in Victoria in the adoption in 1883 of that Act. The fact that the decrees of the "judge in equity" were judgments of the Supreme Court and as such appealable under the Orders in Council to the Privy Council, without necessary intermediate recourse to the Full Court,[2] was a link in the chain of reasoning by which the High Court of Australia held[3] that under the Commonwealth Constitution appeals to the High Court from the Supreme Court of a State were not limited to judgments of the Full Court but extended to all judgments of a Supreme Court, though as a court of first instance and acting by a single judge. Right or wrong, this decision, at the outset of the High Court's history, made a revolution in the relations of courts as they had been conceived of by the public and the profession, for the High Court had been regarded as the abode of learned leisure, essentially a substitute or alternative for the Privy Council, and not as filling the place of the Full Courts of the States, in ordinary appellate business.

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[1] In later years a Justice of the High Court of Australia and President of the Commonwealth Court of (Industrial) Conciliation and Arbitration, author of *A New Province of Law and Order*.

Scattered settlement and difficulties of travel presented special problems in the case of those parts of the colony remote from Melbourne. County Courts instituted in 1852, with the £50 limitation of the English Act of 1846, superseded the New South Wales Courts of Requests and a civil jurisdiction of petty sessions to £10. In 1857 the County Court jurisdiction was raised to £250 and Petty Sessions jurisdiction was restored in specific cases of debt and in assault to a limit of £20. Both have been extended. By 1887 the County Court jurisdiction was increased to £500 and by consent to any amount; the jurisdiction of justices was raised to £50 and the causes were added to. The reasons for the jurisdiction of justices have to a great extent passed away, and the jurisdiction (which is exercised in Melbourne and other towns as well as in country districts) was adversely commented on by the Royal Commission of 1897.

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[1] *Willis* v. *Gipps*, (1846) 5 Moo. P.C. 379. The appeal was not from a court, but under the special provisions for cases of amotion made by 22 Geo. III, c. 75.

[2] *Garden Gully United Quartz Mining Coy.* v. *McLister*, (1875) 1 A.C. 39, 40, where objection to the appeal was overruled.

[3] *Parkin* v. *James*, (1905) 2 C.L.R. 315.

English Procedure.—Procedure and evidence have so closely followed the English model as not to call for notice in civil matters except on a few points. An Act of 1847 struck at two traditions of the jury—in civil cases the twelve good men and true might be four (to-day, six), and unanimity gave way to a three-fourths majority after six hours (to-day, in the case of a jury of six, five-sixths, and in either case after three hours). Actually, a very large proportion of the civil trials to-day is without a jury, Victoria in this respect differing curiously from New South Wales.

In 1857 the privilege attaching to communications to a legal adviser was extended to confessions to a clergyman and to information derived by a medical man in the treatment of a patient. In 1885 the courts were given power to prohibit the publication of proceedings, and in 1891 to exclude the public where public decency and morality appeared to require it, and the Judicial Proceedings (Regulation of Reports) Act, 1929, adopts generally the provisions of the English Act of 1926.

Criminal Procedure.—In criminal jurisdiction the social conditions of New South Wales in 1828 made the grand jury inappropriate, and the Imperial Act of that year provided for the institution of prosecutions by " information " of a law officer, termed in Victoria in 1874 a " presentment," to distinguish it from the information *ex officio*.[1] This remains, but in 1874 provision was made for a grand jury on application to the Supreme Court, as a " safety valve " where there was discontent at the refusal of the law officers to file a presentment, in view particularly of the practice of refusing to file presentments in all cases of criminal libel. The provision has been almost a dead letter, but after the bank failures of 1893, when public opinion was aroused, a grand jury was sought and granted in proceedings against some directors.[2] Procedure at the trial is

[1] An address by Sir Redmond Barry J. to the panel at Portland in 1856 contains an exposition and explanation of the English and Australian systems, with some interesting particulars regarding criminal justice in Australia. It is reproduced in 43 L.T., p. 317.

[2] *R.* v. *Davies and Millidge*, (1893) 19 V.L.R. 246, 251, 269, where the report illustrates the novelty of the procedure. Ultimately, the presentment was quashed on the ground that one of the grand jurors was an alien.

more indulgent to the defence than in England, for in addition to the right to give evidence on oath the defendant may make an unsworn statement on which he cannot be cross-examined, and it is forbidden not merely to counsel for the prosecution but to the judge to comment on his decision not to give evidence on oath, unless the defendant has made an unsworn statement in lieu of giving evidence.

A Royal Commission on the administration of justice in 1897 contains little of general interest, but it made some novel recommendations which have not been acted upon; compulsory resort to a conciliation judge before action; the allocation of part of the fee fund to the provision of costs in cases where the determination of some matter of law was in the public interest; condemnation of legal practitioners in costs in "extreme and obvious cases" where the litigation arose from want of care or skill, *e.g.* in the preparation of a document.[1]

The Legal Profession.—In 1891 discussions going back to the earliest days of the colony culminated in the statutory amalgamation of the professions of barrister and solicitor—a blow struck for "equality" and cheaper law. The Act has been quite ineffective, for in fact the professions are practised separately in Melbourne, and in the country the extensive jurisdiction of the County Court, where solicitors already had the right of audience, covers the greater part of the litigation in the country. The trend of modern legislation, the requirements of taxing and industrial statutes and regulations, the positive duties laid upon ownership and business—registrations, returns, permits—are making constant legal guidance a part of the conduct of affairs, and are bringing the lawyer into a more intimate and continuous relation with the world of business and with the affairs of his client. All this emphasizes the traditional distinction between solicitor and counsel. It is reflected in the reasonable demand that legal education shall recognize the business side of the lawyer's vocation, *e.g.* by provision for training in accountancy. This demand is strengthened by the knowledge that weakness in the system of accounts in a lawyer's office has been the fruitful mother of ill-doing. Parliamentary interference in professional qualifications always excites some apprehensions, but in 1891 Parliament proceeded by "levelling up," and in spite of some lapses for "hard cases" the standard was maintained and has for many years been controlled by a Council of Legal Education. But it becomes increasingly difficult to prescribe a scheme of education which is an adequate training for barrister and solicitor, and yet does not extend over an unreasonable time and include what either will find superfluous in the branch that he has elected to follow. One possible result of co-education of "legal practitioners" has been to facilitate the establishment at the Bar of men who as students have shown outstanding ability and have thus made a reputation and goodwill among their contemporaries—the large proportion of judges and leaders of the Bar who were the "Final Honour Scholar" of their year is striking. Women were admitted to practice in 1903.

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[1] A note on the report of the Commission will be found in this *Journal*, New Series, vol. i, p. 601 (1899).

The Position of the Crown.—Turning to the substantive law, it may seem odd, in a survey professing to exclude public law, to begin with the Crown. But our economy has been and still is fixed in the land, its use and produce, and the land and mining law are perhaps the most distinctive parts of our legal system. In both the root of title is in the Crown, with the result of a constant contact of Crown and subject in the most important matters of property. The multitude of transactions with the Crown under the several Land and Mining Acts, and the difficult questions arising out of them, called for a more efficient remedy against the Crown than the petition of right, and a Crown Remedies and Liability Act was passed in 1857. Limited to cases of contract, its exclusion of tort is tolerable only because the more important public utilities and services undertaken by the State have been committed to statutory corporations, subject in the main to the ordinary law, *e.g.* the railways.[1]

Land Laws.—The story of land settlement, its conflicts and experiments, has been told elsewhere.[2] To the lawyer, it exhibits the importance not merely of the title to the Crown, but of the law of possession.[3] The affirmance by the courts that a possession, though tainted against the Crown, conferred a right against strangers, was of profound importance in the nomadic state where pioneers were roving with their flocks in search of pasture, and contests of shepherds were frequent. More difficult and not less important were the criteria of possession and the area to which it extended, where there were no natural or artificial boundaries, and

[1] Cf. *Sweeny* v. *Board of Lands and Works*, (1878) 4 V.L.R. 446.

[2] *E.g.* S. H. Roberts, *History of Lands Settlement in Australia; Cambridge History of the British Empire*, vol. vii.

[3] Cf. Roberts, *supra*, p. 159.

where the settlement itself was a "run," often of vast extent, about which the squatter moved his flocks according to the season and the state of the feed.[1] In regard to the Crown, opinion accepted the Nullum Tempus Act as part of the law of the colony, and in *A.-G. for New South Wales* v. *Love* the Privy Council and the Supreme Court of New South Wales[2] agreed that the circumstances of the Australian colonies—the universal derivation of title from the Crown, and the frequent vagueness and uncertainty in the determination of boundaries in the early land grants—made the operation of the Act peculiarly important for quieting titles. Nevertheless, in 1907 an Act was passed declaring that the Nullum Tempus Act was not applicable. There are other departures from English law in the relation of time to right—the Prescription Act (2 and 3 Will. IV, c. 71) was never adopted, and the common law rule has been abrogated in respect of the acquisition of light and air since 1907. The events upon which time begins to run or which interrupt the running of time under the Statute of Limitations have been troublesome in Victoria as elsewhere, and amending statutes of 1885 and 1907 were necessary in view of judicial decisions.[3]

The rights of the Crown to mines royal did not depend on the Crown's title to the land or any special reservation;[4] they were of course vital when gold was discovered. But reservation from the grant has been a ready means of nationalizing profits of land—in 1891 all metals and minerals and the *solum* below a depth to be prescribed by Order in Council (actually fifty feet), in 1905 the banks and bed of a stream bounding the land,[5] in 1921 all oil, were to be reserved in grants subsequent to the respective dates. The air has not yet been reserved nor is there any such exclusion of trespass or nuisance for flying as in the British Air Navigation Act, 1920, s. 9. The recent derivation of all titles from the Crown has affected the law in other ways, *e.g.* in displacing the *medium filum viae*[6] and in suggesting considerations applicable to subdivisions.[1] Grants, too, have commonly carried as part of the consideration an obligation on the grantee to carry out improvements ; and, beyond this, the conditions of the country and the settler's life account for numerous positive duties (*e.g.* fencing, suppression of vermin, etc.) laid by statute on owners or occupiers.

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[1] Squatting conditions are well illustrated in the charge to the jury in *Curlewis* v. *Campbell*, a Port Phillip case in 1848 reported in a'Beckett's Reserved Judgments (1850), p. 3, and in *Humphrey* v. *Nowland*, (1862), 15 Moo. P.C. 343, where the judgments of the Supreme Court of New South Wales are set out.

[2] [1898] A.C. 679.

[3] The history is set out in a note to the Property Law Act, 1928, s. 277. The *Trustees &c. Coy.* v. *Short*, (1888) 13 A.C. 703, an incident in the history, was a New South Wales case. The comment by H. W. Challis on *The Squatter's case* in 5 L.Q.R. 185 (1889) will be recalled.

[4] Finally held by the Privy Council in *Woolley* v. *A.-G. for Victoria*, (1877) A.C. 163.

[5] Altering the rule laid down in *Lord* v. *Commissioners of Sydney*, (1859) 12 Moo. P.C. 473.

[6] *Garibaldi Coy.* v. *Craven's New Chum Coy.*, (1884) 10 V.L.R. 233 (L.).

The Australian economy was neither patriarchal nor peasant ; land was "Commerce," it circulated sometimes with the feverishness of a boom. This "commercial" character called of course for its assimilation to moveables. As early as 1813 an Imperial Act for the colony made land liable for all debts in the same manner as personal estate,[2] and in 1864 the Victorian Parliament assimilated real property to leaseholds in devolution upon death. But land has special features which will always demand recognition, and nowhere did nineteenth-century liberalism, with its aims of certainty, publicity, simplicity, speed and cheapness in the law, work to a more successful issue than in the Land Transfer system to which Torrens's name is attached. The way to the new system was made easier by the common origin of titles and their recent date, by the legislative provision for matters which might otherwise have involved special burdens on the titles (*e.g.* the provision of adequate roads and access to roads in the survey and division of lands) and the general absence of family settlements. The Torrens system was enacted in Victoria in statutes which, beginning in 1862, assumed their mature form in 1866. It is unnecessary to describe a system that is now familiar enough and has its own literature. Nothing of course is quite as simple as it seems, and the working out of the Torrens system of titles—which varies in some important particulars in the countries that have adopted it—has given the lawyer in Australia (and perhaps particularly in Victoria) his part among the pioneers.[3] One matter at present causes him concern, and calls for correction. It detracts seriously from the whole system when unregisterable charges are laid upon the land. This has been done in recent years to a quite considerable extent by Commonwealth and State Parliaments, not merely as to taxes but as to other liabilities also, *e.g.* contribution to cost of fencing. Apart from the grave consequences to purchasers and mortgagees, the practice is significant of

[1] Cf. *Vinnicombe* v. *McGregor*, (1903) 29 V.L.R. 32, 41.

[2] Cf. *Bank of Australasia* v. *Murray*, (1850) 1 Legge 612, 616 (N.S.W.).

[3] The case of *Clements* v. *Ellis et al*, (1934) Argus L.R. 225, just decided, shows the High Court equally divided on a question of great importance.

the diminished force of those ideas of which the Transfer of Land Act was the outstanding expression.

Mining Law.—It testifies to the general prevalence of law and order in our history that Victoria can afford to treat the incident of the Eureka Stockade—the armed resistance of the Ballarat gold-field to the administration of the system of government licences—as an heroic or romantic episode, just as it does the exploits of the bushranging "Kelly Gang." "Eureka" also gave us our one "State trial"; public opinion was against the Governor or government—it was in 1855, after separation from New South Wales and on the eve of responsible government—the prisoners were defended by a notable Bar, and the verdict was acquittal. The form which the gold-mining laws assumed in the following twenty-five years is the peculiar contribution of Victoria to the law of Australia and New Zealand.[1]

Its history is a miniature of a certain type of legal development. The suggestion was found in the tinners' rights of the county of Cornwall, which were adapted to the gold of the unalienated lands of the Crown in the colony.[2] The holder of a "miner's right" had access to these lands to search for gold, and "a sort of easement" which protected his "claim," with ancillary rights of residence and use of water.[3] The claim was liable to forfeiture if not worked, but was protected until judicially terminated ("a most wise law," in the opinion of the Privy Council).[4] Local courts provided for the speedy determination of disputes, an important matter. District mining boards consisting of representatives of holders of miner's rights on the field, framed by-laws, which were in substance the customs and usages of the miners themselves. There was much similarity—similar conditions begat similar customs and the boards learnt from each other's experience. But there was some diversity also, ambiguity, and over-frequent change.

In 1865, contemporaneously with the general consolidation of the statutes, a comprehensive Mining Statute was passed which, while based generally on the by-laws and therefore on local usage and custom, gave a uniform law. A special court of appeal from the Wardens and Courts of Mines, with its own permanent judge, carried uniformity and experience into administration of the law. The name of Sir Robert Molesworth, the member of the Supreme Court Bench who acted as judge of this appeal court, will always be peculiarly associated with this distinctive part of Victorian law in what was for many years the distinctive industry of the colony.[1]

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[1] "The Mining Statute of 1865 is in fact the foundation of the mining laws of Australasia."—Armstrong, *Law of Gold-mining in Australia and New Zealand*, p. 6. The introductory chapter to this work is an interesting brief history of the subject.

[2] The law was not extended to mining on private property until 1884. It will of course be remembered that gold wherever found belongs to the Crown.

[3] Among the modes of disturbance, "gas warfare" was not unknown. An Act of 1871 makes it a misdemeanour in any mine to use "any suffocating, stupefying, or overpowering fumes, gas or vapour with intent to drive any person out of another mine."

[4] *Mulcahy* v. *Walhalla Coy.*, (1871) 40 L.J. P.C. 41.

Company Law.—Among the needs of the mining industry was a law apt for the companies, often of "small men," associated in working claims, and apt also for the speculative nature of the industry itself. For the first, the Companies Law, in the 50's itself still crude and experimental, was too cumbersome and the law of partnership (even of the limited partnership which was tried) inadequate; for the second, it was impossible in the case of a gold-mine to forecast the amount of capital that would be necessary, and people were averse from undertaking the risks that lay in liability to calls, or were active in "dummying" their shares, so that called capital was not realized. To meet these conditions, an Act of 1871 provided for a "No Liability Coy.": the shareholder is neither during the active life of the company nor in its winding up legally liable to pay any calls; but if he does not pay calls as made, he forfeits all interest in the company. The system was adopted with some hesitation and was frankly experimental. It has, however, served its purposes, and for long practically all the mining companies in Victoria have been in this form. An extension of the scheme to trading companies was one of the matters of the Companies Act, 1896; but there was no demand for it there, and the extension was repealed in 1910.

Liens.—Present conditions make all the world aware of the importance of finance in the land systems of the new countries. "Share-farming" in Victoria has adopted the forms of partnership, tenancy or employment with licence.[2] "Instalment purchases" are perhaps not so much the extension of "sales on time payment" from goods to land, as the application to private transactions of methods employed in the settlement of Crown lands; at any rate, the common use of the system in Australia has rather outrun the aid afforded by English decisions.[1] On the face of it, the liens on stock, wool and growing crops would hardly appear important enough to claim a place in a brief survey of legal history. They have become an important instrument in the finance and credit of land transactions and rural production, and they are so far distinctive that the main conflict over their introduction was on the question whether they were repugnant to the laws of England so as to be outside the powers or proper exercise of powers of a colonial legislature. It is the circumstances of their introduction, the assembling of a number of economic, social, constitutional and legal factors that (not without a certain element of comedy) give the matter its peculiar interest, particularly in these present times of crisis. In 1843 the colony was in a state of deep depression, following upon wild speculation in land which had particularly assailed Port Phillip and Melbourne. Fortunes were buried in debt, and though an Insolvency Law had been passed in 1841,[2] debtors were dependent for their discharge on the assent of three-fourths in number and value of their creditors, and liable in some degree to imprisonment. The ordinary means of security were exhausted; land had suffered a catastrophic fall in value and was "mortgaged up to the hilt"—"a drug in the market"; credit on personal security was almost entirely withheld. The time was ripe for what to-day would be called "emergency measures." An Imperial Act of 1842 had just transformed the Legislative Council of New South Wales from a wholly nominee body to one in which elected representatives had a two-thirds majority. There were indications that the day of the debtor had arrived. Bills for fixing a maximum rate of interest with retrospective operation, and for the relief of mortgagors by the interposition of government credit, were rejected by the legislature itself. But a proposal to enable the licensees of Crown land to mortgage their holdings, "in other words, mortgaging the lands of the Crown," was only checked by the Governor, and a "moratorium" was by the intervention of the same authority qualified by the requirement of a three-fourths majority of creditors. Two changes in the law of first-rate and permanent importance were made: the Insolvency Act of 1843 put the certificate of discharge in the control of the Commissioner of Insolvent Estates instead of the creditors, and abolished imprisonment for debt; 7 Vict.

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[1] "It is a well-known fact that the mining law of Australia was practically made by the decisions of Mr. Justice Molesworth and the Supreme Court of Victoria."—Per Griffith. Cf. *Theodore* v. *Theodore*, (1897) 8 Q.L.J. 76.

[2] Cf. *Hindmarsh* v. *Quinn*, (1913) 17 C.L.R. 622.

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[1] Cf. *Reynolds* v. *Fury*, (1921) V.L.R. 14, 21; *McDonald* v. *Dennys Lascelles and Company*, (1933) 48 C.L.R. 457.

[2] Following a notable decision in 1839 that the Bankruptcy law of England was not in force in the colony—*ex parte Lyons*, (1839) 1 Legge 140 (N.S.W.).

No. 19, an Act "to give a preferable lien on wool from season to season and to make mortgages of sheep, cattle and horses valid without delivery to the mortgagee," was a constructive credit measure. Claims have been made that the idea came from a West Indian analogy; or again that, as in the Torrens title, Australia was indebted to the British ship, for the essential feature of the new security was that it was ineffective until registered; probably both of these suggested origins are no more than arguments or analogies to show that the sort of thing being done was not unknown or repugnant to English law, for it was as "irreconcilably opposed to the principles of legislation immemorially recognized in this country respecting the alienation or pledging of things moveable" that the Secretary of State (Stanley) denounced it; it would stimulate the speculative spirit from which the colony had suffered so much, and would place society at the mercy of any dishonest borrower. Threatened with disallowance, the legislative council repealed the measure in 1845 and passed a temporary Act, to operate until the end of 1848, of substantially the same import, in the hope that the evidence and arguments by which they supported it would remove the objections of the Secretary of State. If he remained obdurate—well, with neither steamships nor telegraph and with the comparative leisure of those days some two years' grace might be expected. The Report of the Council Committee was the work of that remarkable man W. C. Wentworth, and the case put up was formidable. It pointed out that a mortgage of goods without delivery of possession was well known to English law and that the essence of the present measure was that no security under it should be valid without registration, so that, far from encouraging secret frauds, the Act provided for a publicity which effectually prevented them. There followed a comparison of English and Australian conditions, interesting in itself and in the inference drawn from it: "With us, sheep, cattle and horses form the principal or staple property of this country, as fixed property is the principal or staple property of England, and ought therefore in the opinion of your Committee to have all the uses and incidents of fixed property there." And registration applied to them corresponded with the muniments or title-deeds of real property.[1] But Grey and Gladstone, successive

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[1] In reading this Report, one is reminded of theories of *res mancipi* in Roman law and of the development of English law—the notion of property in its fullest forms manifesting itself in the "staples" of a country, the things that form the characteristic and permanent stock of its wealth.

The present law is contained in the Instruments Act, 1928.

Secretaries of State, were as stiff as Stanley and there is a confusion of Bills, Acts, reservations and disallowances, and misunderstanding between the Governor and the Secretary of State. The Victorian Legislative Council after 1850 takes over the matter so far as concerns the new colony, and after two temporary Acts a permanent Act was passed in 1859. Having shared, with the discovery that unsaleable sheep were valuable commodities as tallow, the credit for "recovery," the new security—the stock on a station, the wool on the sheep's back—finds a firm place as "reform" in the finance of rural economy. As a "privilege" of the pastoral order, it was for long a grievance of the farmer; it was not until 1878 that the season's growing crop was assimilated to the ensuing wool clip.

The Effect of the Crisis of 1893.—The crisis of 1893—the "crash" following the boom—was managed within the law of insolvency and company winding-up and reconstruction; as already mentioned, it accounted for drastic provisions in the Companies Act, 1896, regarding company management. These provisions in turn accounted for the recognition of a new class of companies, "proprietary" or private companies of not more than 25 (now 50) members, in which there was not the same need for the legal protection of the public as actual or possible shareholders, and which therefore stood outside a considerable portion of the Act. The proprietary company is now a common institution in commercial life. The other results of the crisis of 1893 were in a field outside this survey—a Factories Act of 1896, designed to stamp out sweating that had grown up in the depression, instituted "wages boards" to fix minimum wages for certain specified industries, and this rapidly expanded into a system of general wage regulation; and a "back to the land" movement, evidenced by statutes from 1893 onwards, to stimulate rural settlement, first by facilitating the acquisition of government lands by settlers, later extending to the government acquisition, by agreement or compulsion (1904) of private lands. The assaults on contract rights which have marked the present crisis since 1930 have been described in this *Journal*[1]: each succeeding session shows that "emergency legislation" carries numerous unforeseen consequences, stimulates attempts at expansion and is difficult to shake off.

Family Relations; Labour Legislation.—Liberality of sentiment, equalization of conditions, the ready response to the "hard case"

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[1] Vol. xv, p. 82 (1933), vol. xvi, p. 85 (1934).

"underdog"-edness—have expressed themselves both in the intolerance of distinctions savouring of privilege and subjection and in the institution of "laws of special condition." The fervour of the dissenting judgment of Isaacs J.[1] in *Wright* v. *Cedzich*[2] (right of a wife to maintain an action for loss of *consortium*), rejecting "a repellent position of legal and moral degradation" involved in the arguments for differentiation of husband and wife, illustrates the standpoint of an Australian legislature to many subjects. Those who insist that the true mode of approach to the most common specific relations of persons in English is through notions and considerations outside contract will find good warrant in the history of "master and servant" in Australian law. The colony came under the English Combination Act, 1825, with its interpretation of "free trade in labour" and consequent hostility to combinations impairing that restraint.[3] Legislation for the peculiar circumstances of the colony is marked by its penal character mainly but not solely against the servant. The amendment and consolidation of 1845 in New South Wales mitigates some of the rigour of earlier Acts, and an Act of the same character in Victoria in 1864 goes rather farther. Acts of 1884 and 1886 gave to trade unions substantially the position they had in England under the Act of 1871. The consolidation of 1890 revealed a state of the law which, though in practice not oppressive, was anomalous, and in 1891 an Act was passed substantially adopting the two Acts of 1875—the Conspiracy and Protection of Property Act and the Employers and Workmen Act. At the same time existing legislation was repealed, including a number of English Acts from 5 Eliz. c. 4 to 6 Geo. IV, c. 129. The result claimed was that inequality was put an end to and the relations of master and servant were now a civil matter—" just like any other contract." The provision for the protection of the employee grew. In 1870 recourse for wages due by contractor was allowed against moneys due to him ; wages have preference in bankruptcy and the winding-up of companies ; from 1927 they have protection against attachment to the amount of £3 per week. An Act of 1886 followed the English Employers' Liability Act, 1880, and in 1908 a Workers'

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[1] Later, Chief Justice; now, Governor-General of the Commonwealth.

[2] (1929–30) 43 C.L.R. 493. Cf. *Place* v. *Searle*, [1932] 2 K.B. 497, where the opinion of Scrutton L.J. that a wife can maintain the action is in accord with the view of Isaacs J. *Newton* v. *Hardy*, (1933) 49 T.L.R. 522 (in which *Wright* v. *Cedzich* is referred to) and *Elliott* v. *Albert*, (1934) *The Times*, July 7.

[3] See Dicey, *Law and Opinion*, Lecture vi.

Compensation Act was accompanied by provisions for compulsory insurance.

The growing volume of the Factories Acts, the State Wages Boards and above all the Commonwealth Arbitration system, with its prohibition of strikes and lock-outs, its collective bargaining, and industrial agreements, a new legal concept of the "industrial dispute," with classes and not individuals as the unit,[1] present so many deviations from the ordinary contractual relation as inevitably to prompt anyone recalling Maine to think of a movement in reverse —from contract to status.[2] The Trade Disputes Act, 1906, has not been adopted.

Where interests are not engaged, there is little resistance to emotion or opinion. In succession to property, we have the assimilation of freehold to personalty (1864); compulsory provision for widow and children (but not for a widower) without sufficient means of support (1906), as well as the widow provision of English law, though the mutual succession of mother and illegitimate children awaited the consolidation of 1928. Words imputing unchastity to women became actionable *per se* in 1887, and from 1910 loss of service and the relation of master and servant are to be conclusively presumed in actions of seduction; the presumption of coercion in crimes, repealed in England in 1925, remains. The Married Women's Property Act, 1870, went rather beyond the English Act of the same year, and provided that a husband should not be liable for his wife's torts.[3] In the adoption of the later English Act in 1884, this provision was lost, and the omission was not supplied till 1908.[4] Legitimation by subsequent marriage was introduced in 1912, but adoption not till 1928. Religious equality was promoted by the successive provision for Presbyterians and Roman Catholics (1834), Wesleyans (1839), Congregationalists and Baptists (1840) that marriages between members of these churches celebrated by their respective ministers should be as valid as if celebrated by a minister of the Church of England;[1] the liberality which in 1859 extended the power to all ministers of religion called later for precautionary regulations. Lyndhurst's Act, making void instead of voidable marriages within the prohibited degrees, has not been adopted, a course probably referable to conflicting motives—that while there is an inclination to prevent such marriages there is a disinclination to disturb the relations which in fact result from them.[2] Marriage with a deceased wife's sister and the extension of divorce to grounds unknown to English law are part of the general constitutional history of the British Empire. The first was established in Victoria in 1873, later than in some other colonies. In divorce, Victoria was the pioneer. Following the English Divorce Act of 1857, a Bill was introduced in 1860. To the grounds of divorce in the English Act it added four years' desertion, for reasons which can be well understood in the case of a country where migration remained a habit among a large part of the population. The Bill, however, did not receive the Royal Assent and the Act passed in 1861 conformed to the English Act. The Act of 1889 provided not merely for desertion, but for habitual drunkenness or cruelty and for imprisonment extending over prescribed periods. Insanity was added in 1919. Significantly, the Act of 1889 was not a government measure; it is popularly known as the "Shiels Act" from the private member who sponsored it. A general divorce law for Australia is within the powers of the Commonwealth Parliament; and a single administration with a single Australian domicile would clear the jurisdiction from difficulties in ascertaining whether parties are domiciled in a particular State. But due regard for the powerful religious convictions hostile to the whole institution of divorce makes Government and Parliament alike averse from action.

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[1] Cf. *Geo. Hudson Ltd.* v. *Australian Timber Workers' Union*, (1923) 32 C.L.R. 413, 437, 441; *Federated Municipal and Shire Council Employees Union of Australia* v. *Melbourne Corporation*, (1918–19) 26 C.L.R. 508, 550 *seq.*

[2] *E.g.* "The broad fact that emerges is that the position of industrialists, by a singular reversal of what has been thought to be the general current of history, has been gradually changing from one of pure contract to one of status."—*Federated Municipal and Shire Council Employees Union of Australia.* v. *Melbourne Corporation*, (1918–19) 26 C.L.R. 508, 555, per Isaacs and Rich JJ.

[3] Cf. *Lucas* v. *Kearney*, 4 Australian Jurist Reports 19.

[4] The provision may have relevance to other disputed questions under the M.W.P. Acts, *e.g.* those discussed in *Cuenod* v. *Leslie*, [1909] 1 K.B. 880, *Edwards* v. *Porter*, [1925] A.C. 1, and *Brown* v. *Holloway*, (1909) 10 C.L.R. 89. See *R.* v. *Joyce*, (1927) V.L.R. 343, 481.

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[1] These statutes were prior to the decision of the House of Lords in *R.* v. *Millis*, (1844) 10 Cl. and F. 534. The question whether the law as laid down in that case applied in Australia in cases outside the statutes was elaborately argued and considered by the Supreme Court of New South Wales in *Reg.* v. *Roberts*, (1850) 1 Legge 545. In the course of the case the Resident Judge at Port Phillip was consulted. One of the judges (Dickinson J.) held that *R.* v. *Millis* was not part of the law of the colony and that a marriage *per verba de praesenti* was valid.

[2] Cf. *In re Swan*, (1871) 2 V.R. (I.E. and M.) 47. As late as 1906, it was argued that the 28 Henry VIII, c. 7, with its table of prohibited degrees was not in force in Australia. The decision of the New South Wales Court, affirmed in the High Court of Australia, declared (quoting Lord Wensleydale in *Brook* v. *Brook*) that "to hold this would be prejudicial to our social interest and of hateful example," and that "it would shake society to its basis and create a state of things not creditable to a civilized country." *Major* v. *Miller*, (1906) 6 S.R. (N.S.W.) 24; 4 C.L.R. 219. In Victoria the statute had been applied in *Wade* v. *Baker*, (1868) 5 W.W. and a'B. (I.E. and M.) 63, and *In the Will of Swan*, (1871) 2 V.R. (I.E. and M.) 47.

Conclusion.—The length of this paper on the legal history of a single State of the Commonwealth already amounts to an abuse of the hospitality of the *Journal*. I would make some amends by concluding with a reflection that appears of general significance, particularly at a time when the administration of justice and "law reform" are again engaging attention in Great Britain. In a recent address in Melbourne on "Science and Judicial Proceedings," Dixon J. pointed out that uncertain criteria of liability, such as "cause" in tort, raised issues which could be investigated only with an expenditure of time, labour and money often appearing disproportionate to the interests involved, and that modern science, even in apparently simple cases having on the face of them no technical character, both extended the area of inquiry and demanded appreciation of special branches of knowledge. The general truth thus illustrated, he expressed in the following terms:

> That which determines the character and scope of every judicial inquiry is the criteria laid down by the law as the measure of the rights of the parties. I venture to think that in most discussions of our legal system, this cardinal fact is overlooked. The structure, composition and procedure of the courts are examined as if the complexity, length and cost of litigation depended upon these matters. Much more it depends upon the nature of the questions which the courts are called upon to investigate and answer.

THE CONSTITUTIONAL CAPACITY OF CANADA TO GIVE EFFECT TO INTERNATIONAL LABOUR CONVENTIONS.

[*Contributed by* C. WILFRED JENKS, ESQ.]

Introduction.—Fifteen years have now elapsed since Canada secured international recognition of her national maturity by her admission to the League of Nations and the International Labour Organization as an original Member. In the course of that time the International Labour Conference has met eighteen times and has adopted 44 Draft Conventions,[1] the object of which is to regulate internationally the most varied aspects of the problems of industrial life and labour. Of these Conventions Canada has ratified only four, the Minimum Age (Sea) Convention, 1920, the Unemployment Indemnity (Shipwreck) Convention, 1920, the Minimum Age (Trimmers and Stokers) Convention, 1921, and the Medical Examination of Young Persons (Sea) Convention, 1921. Her record in this respect compares unfavourably with that of other Members of the Organization of comparable industrial importance. To mention but a few such members, Belgium has 23 ratifications to her credit, Italy 21, France and Great Britain each have 18, Germany has 17, and India and Japan, despite the obvious difficulties which confront them in any attempt to come into line with world standards,[2] have 13 and 12 respectively.

This relative backwardness on the part of Canada is explained by the federal character of her Constitution, which has been generally believed to limit almost to vanishing-point her capacity to ratify International Labour Conventions. The possibility that such difficulties might arise was foreseen at the Peace Conference, the case then in mind being that of the United States, and there was inserted in Part XIII of the Treaty, which forms the Constitution of the International Labour Organization, a special provision qualifying the obligations placed thereby upon federal States.[1] This provision was, however, a concession reluctantly made by the delegates of other countries ; [2] it may only be taken advantage of in cases to which constitutional limitations genuinely apply ; and it is obviously undesirable, and indeed a violation of the Treaty, that recourse should be had to it on no stronger ground than that a federal State is reluctant to regulate by federal legislation questions in respect of which it is to some extent competent, but which have hitherto been dealt with on a Provincial basis. Canada has never formally relied upon this paragraph, but has adopted a procedure which gives substantially the same result.

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[1] A collection of the texts of these conventions is published by the International Labour Office under the title "Draft Conventions and Recommendations adopted by the International Labour Conference." New editions are published every few years. The texts are also conveniently accessible in Hudson, *International Legislation*.

[2] Art. 405, para. 3, of Part XIII provides for the grant of less exacting treatment to such countries, but the Conference has rarely utilized the powers conferred upon it by this paragraph. See Jenks, "The Revision of International Labour Conventions," in *British Year Book of International Law*, 1933, at pp. 59–60.

In these circumstances, it may be of some interest to attempt a reconsideration of the constitutional capacity of Canada to give effect to International Labour Conventions. Various writers have noticed a certain shift of emphasis in the more recent decisions of the Judicial Committee of the Privy Council upon the Canadian Constitution.[3] It will be of interest to inquire how far this shift of emphasis justifies a hope that the imagined limitations upon the competence of the Dominion may prove unreal. If such a hope is well founded, the fact is clearly of the first importance, for it would imply that Canada will be able in the future, as she has not been able in the past, to play a part in the promotion of international social progress reasonably commensurate with her industrial strength and high standard of life.[1]

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[1] Art. 405 (9).

[2] For the discussion of the question by the Commission on International Labour Legislation of the Peace Conference see its minutes (available in International Labour Office, *Official Bulletin*, vol. i, where the relevant passages are at pp. 57–8, 60–1, 73–6, 80–2, 86–93, 117–21, 149–58 and 176–83) or the stenographic record of its discussions (available in French in *La Paix de Versailles, Législation Internationale du Travail*, where the relevant passages are at pp. 327–8, 330–3, 369–73, 388–91, 401–11, 438–44, 487–500 and 519–27). See also *The Origins of the International Labour Organization* (Carnegie Endowment), vol. i, pp. *145-63, for an account of the negotiations by Mr. E. J. Phelan.

[3] Despite differences in their subject-matter, *Edwards* v. *Attorney-General for Canada*, [1930] A.C. esp. at pp. 136–7, *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, [1931] A.C. 310, *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, *In re the Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, and *Croft* v. *Dunphy*, [1933] A.C. 156 all reveal a tendency to interpret the Canadian Constitution in the manner stated by Mr. Justice Holmes, in his now classical judgment in *Missouri* v. *Holland* (252 U.S. 416, 40 S. Ct. 382), to be that most appropriate for the construction of " words that also are a constituent Act " which has " called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."

The subject can most conveniently be treated by reciting the obligations of Canada under Part XIII and indicating the relevant sections of her Constitution, by giving an historical sketch of the action which she has taken on the various proposals of the International Labour Conference, and by proceeding on the basis of this material and in the light of recent decisions of the Judicial Committee to consider how far she is constitutionally competent to ratify Conventions more freely than in the past, and how far, if her competence is less restricted than has been believed, the procedure which she has hitherto adopted fulfils satisfactorily her obligations under the Treaty.

The Applicable Texts.—The obligations of Members of the International Labour Organization in respect of Conventions adopted by the Conference are defined in the following paragraphs of Art. 405 of Part XIII :

> 5. Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.
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> 6. In the case of a recommendation, the Members will inform the Secretary-General of the action taken.
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> 7. In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.
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> 8. If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.
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> 9. In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

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[1] For a full account of the extent to which effect is in practice already given by Dominion or Provincial legislation to the Nine Points of Art. 427 and the earlier Draft Conventions, see Bryce M. Stewart, *Canadian Labor Laws and the Treaty.* Columbia University Press, 1926.

They may be summed up by saying that while there is no obligation to ratify, there is an obligation seriously to consider ratification. This obligation has a definite Treaty basis, and it is therefore quite distinct from the moral obligation to ratify beloved of some writers on international law.[1] It is subject to qualification in the case of federal States which, in certain circumstances, may elect to consider Conventions as recommendations only. This concession is not, however, a general one. It does not exist in favour of all federal States and in respect of all Conventions, but only in favour of federal States subject to limitations of their constitutional authority to accept and give effect to international obligations and in respect of Conventions to which such limitations apply. The text is quite clear upon the point, and it would be impossible to find words which more appropriately explain its effect than those used by Sir Malcolm Delevingne in proposing the present wording of the paragraph to the Commission on International Labour Legislation of the Peace Conference. He spoke as follows :

> The second modification is of much greater importance and is undoubtedly a serious change in the substance of the scheme. In effect it places the United States, and any other State which is in a similar position, on a different footing from and under a less degree of obligation than other States in regard to draft Conventions adopted by the Conference. The Commission, however, will observe two points in connexion with the drafting of this exception from the general provisions of the scheme ; first, that the exception extends only to the Federal States which are subject to limitations in respect of their treaty-making powers on labour matters ; second, that the exception extends only in so far as these limitations apply, and no further.
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> A State will not be able to take advantage of the exception on any ground except that of actual existing limitations on its powers which prevent it entering into a labour Convention. And a State in which such limitations exist will only be able to claim the exemption in regard to Conventions to which the limitations apply. If a Convention is proposed by the Conference to which the limitations do not apply and which is within the competence of the Federal Government, then the general provisions of the scheme in regard to Conventions will apply and the State will be under the same obligations as any other State. Also, if in the course of time the limitations are removed, those obligations will automatically apply.[2]

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[1] For discussions of the rôle of ratification in modern international law see Oppenheim, *International Law*, 4th ed. by McNair, vol. i, at pp. 718–23 and literature there cited.

[2] Minutes of the Twenty-eighth Meeting of the Commission on International Labour Legislation, in International Labour Office, *Official Bulletin*, vol. i, at pp. 177–8.

Practice subsequent to the Treaty has been based upon the same view, and on two occasions claims to act under the paragraph have been abandoned on its applicability being contested. Switzerland made such a claim in respect of the Weekly Rest (Industry) Convention, and Germany in respect of the Minimum Age (Agriculture) Convention, but in each of these cases the claim was abandoned when the International Labour Office contested its propriety, though only, in the case of Germany, subject to the reservation of the question of principle as affecting possible future cases.[1] Canada has never formally relied upon this paragraph, and it will be argued below that her constitutional incapacities are not such as to entitle her to the benefit of it. It follows that her obligations in relation to ratification are those stated in paragraphs 5 and 7 of Art. 405.

The relevant provisions of the Canadian Constitution are, naturally enough, more complicated than the above paragraphs of the Treaty. It is not proposed to set forth here the familiar ss. 91 and 92 of the British North America Act, still less the specialized provisions of ss. 93, 94 and 95. Some knowledge of these sections and of the principal cases[2] concerning their relation to one another will be assumed. In this article it is proposed to consider the matter primarily with reference to

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[1] Report of the Director to the Eighth Session of the International Labour Conference, paras. 51–3, at pp. 115–23 of vol. ii of *Final Record*. Also *Final Record*, vol. i, at pp. 90–2.

[2] Particularly of the cases in which, to use an apt expression of Lord Sankey, the Board has undertaken " the useful and essential task of taking stock of this body of authority (*i.e.* the earlier decisions) and reviewing it in relation to the original text." Lord Sankey groups under this head *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1896] A.C. 348, *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1898] A.C. 700, *City of Montreal* v. *Montreal Street Ry.*, [1912] A.C. 333, *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A.C. 571 and *Attorney-General for Canada* v. *Attorney-General for British Columbia*, [1930] A.C. 111, 118. But see also, as illustrating important general characteristics of the distribution of legislative authority in Canada, *Russell* v. *The Queen*, (1882) 7 App. Cas. 829, *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437 and *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695. For the " pith and substance " doctrine see *Attorney-General for Quebec* v. *Queen Insurance Co.*, (1878) 2 App. Cas. 1090, *Citizens Insurance Co.* v. *Parsons*, (1882) 7 App. Cas. 96, *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, *John Deere Plow Co.* v. *Wharton*, [1915] A.C. 330, *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91, *In re Board of Commerce Act*, [1922] 1 A.C. 191, *Attorney-General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328 and *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396. With these compare the American case *Hammer* v. *Dagenhart*, ((1918) 247 U.S. 251). Cameron, *The Canadian Constitution and the Judicial Committee*, in 2 vols., is a convenient collection of all but the most recent of the Privy Council cases.

s. 132 [1] and it will therefore suffice to quote this latter section, which is as follows:

> 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

The Action taken by the Dominion, 1920–34—In re Legislative Jurisdiction over Hours of Labour, 1925.—Shortly after the Washington Conference the Dominion Government adopted a procedure which it believes to be, and which the competent organs of the International Labour Organization have hitherto accepted as being, a satisfactory fulfilment of its obligations under Art. 405 of the Treaty. The Draft Conventions adopted by this Conference were referred for his opinion to the Minister of Justice, whose conclusions were approved by a Report of the Committee of the Privy Council, approved by His Excellency the Governor-General in Council on November 6, 1920.[1] This Report indicates that the Minister has had under consideration the question of what authority or authorities are to be considered as the competent authority or authorities for the purpose of considering these Conventions, and of what action should be taken by the Dominion Government to give effect to its engagements under the Treaty. The Minister is stated to be of opinion that the provisions of Part XIII impose no obligation on the Dominion to enact into law the Conventions or Recommendations adopted by the Conference, but that its obligations will be fully discharged by bringing each of the proposals adopted by the Conference to the attention of " the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." The Treaty engagement being of this kind, the Minister did not think it such as to justify legislation on the part of Parliament under the authority of s. 132 of the British North America Act, 1867, with a view to giving effect to any proposals which would otherwise, as between the Dominion and the Provinces, be within the legislative competence of the latter. He therefore opined that the Government's obligation would be fully carried out if the different Conventions and Recommendations were " brought before the competent authority, Dominion or Provincial, according as it may appear, having regard to the scope and objects, the true nature and character of the legislation required to give effect to the proposals of the Conventions and Recommendations respectively, that they fall within the legislative competence of one and the other." He thereupon stated in detail the extent to which the various Conventions and Recommendations adopted at Washington involved legislation competent to Parliament and the extent to which, in his judgment, action by the Provincial Legislatures would be required to make them effective in Canada. A copy of this report was transmitted to the Lieutenant-Governors of the Provinces for whatever action they might deem appropriate to give effect to such of the proposals made by the Conference as fell in Canada within the Provincial sphere. A further copy was submitted to the Dominion Parliament. The International Labour Office was officially notified that this had been done and that the obligations of Canada under Art. 405 had thereby been fulfilled. The same procedure has been adopted after each subsequent session of the Conference. The Draft Conventions and Recommendations adopted have been referred to the Minister of Justice for his opinion as to the respective competence in relation thereto of Parliament and of the Provincial Legislatures; the conclusions of the Minister of Justice have been approved by Privy Council Minute; the proposals of the Conference have been brought to the attention of the competent legislative bodies; and the International Labour Office has been notified that this has been done.[1]

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[1] The writer is, however, convinced that a strong case can be made for Dominion competence to give effect to a considerable number of International Labour Conventions even independently of s. 132, but must reserve for another occasion the detailed argument in support of this view. Suffice it to say here: (1) that the combined effect of s. 3 of the Statute of Westminster, 1931 (22 Geo. V, c. 4) and of *Croft* v. *Dunphy*, [1933] A.C. 156, is to remove such constitutional limitations as hitherto existed upon the power of the Dominion to give effect to maritime conventions; (2) that the decisions in *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, [1931] A.C. 310 and *Toronto City Corporation* v. *The King*, [1931] A.C. at p. 104, clear up misapprehensions as to the scope of the Dominion power to create new crimes and suggest that the decisions in *In re Board of Commerce Act*, [1922] 1 A.C. 191, *Attorney-General for Canada* v. *Reciprocal Insurers*, [1924] A.C. at pp. 336–43, and *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, once they are properly understood, do not at all imply that it will normally be unconstitutional for the Dominion to create new criminal offences for the purpose of dealing with new social problems; (3) that the emergency powers of the Dominion as defined in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695, may justify legislation intended to give effect to any international convention representing a co-operative effort for the purpose of combating a world economic crisis; (4) that in *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, [1931] A.C. 310, 326, the Privy Council has given us reason to suppose that the dicta narrowing the scope of the Dominion power to regulate trade and commerce the development of which can be traced from *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, 112, through *City of Montreal* v. *Montreal Street Ry.*, [1912] A.C. 333, 343, to *In re Board of Commerce Act*, [1922] 1 A.C. 191 and *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, 409, construe that power much too narrowly; (5) that none of the cases upon the Dominion jurisdiction in respect of naturalization and aliens, not even *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, or *Brooks Bidlake & Whittall Ltd.* v. *Attorney-General for British Columbia*, [1923] A.C. 450, contains anything which suggests that this jurisdiction would not be available for the purpose of giving effect to obligations under International Labour Conventions to assure equality of treatment to national and foreign workers; (6) that the concurrent jurisdiction of the Dominion over agriculture as to the relation of which to the subjects reserved under s. 92 there is no Privy Council ruling, is probably available for the purpose of giving effect to International Labour Conventions relating to agriculture.

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[1] The text of the Report is printed in vol. ii of the *Official Bulletin* of the International Labour Office, on pp. 11 to 14 of Nos. 15–16.

It is clear that the Dominion Government has never looked upon this ritual as more than a literal compliance with its obligations under the Treaty, and on a number of occasions it has taken the initiative in summoning at Ottawa Inter-Provincial Conferences which have examined the various proposals of the International Labour Conference with a view to the acceptance of some of these proposals on behalf of Canada as a whole by agreement between all the Provinces.[2] But if judged by its fruits, the Conference method has not been a success. It has not led to the ratification of a single Convention any part of the subject-matter of which is on any construction of the Constitution within Provincial competence.

At one such conference doubts appear to have been suggested as to whether the procedure adopted by the Dominion Government was that most appropriate to give effect to Canada's Treaty obligations, and the representatives of Ontario seem to have taken the view that the ratification of Conventions and any legislation required to give effect to them was at all times within Dominion competence and that the Provinces were not concerned in the matter. The expression of these doubts was followed by a discussion of the matter in Parliament,[3] and eventually led to certain questions being referred by the Governor-General for the opinion of the Supreme

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[1] International Labour Office, *Official Bulletin*, vol. ii, Nos. xv–xvi, pp. 10–11, vol. iii, pp. 695–8, vol. vi, pp. 284–9, vol. vii, pp. 163–4, vol. ix, pp. 106–7 and 134, vol. xii, pp. 99–109, vol. xiii, pp. 34–8, and *Industrial and Labour Information*, vol. xxxvii, pp. 381–3, vol. xxxviii, pp. 274–5, vol. xlvi, pp. 243 and 318, vol. xlvii, p. 241. For a detailed summary of the position in February 1931 as regards the allocation of questions to Dominion or provincial authorities and the state of legislation in Canada see *Industrial and Labour Information*, vol. xxxviii, pp. 101–4, 125–31 and 167–76.

[2] International Labour Office, *Official Bulletin*, vol. vi, pp. 511–12, vol. viii, pp. 185–6, 187, 188–9, 243–59 and 261, and *Industrial and Labour Information*, vol. iv, p. 311, vol. v, p. 508, vol. viii, p. 141, vol. xxix, p. 188.

[3] International Labour Office, *Official Bulletin*, vol. viii, p. 185. *Industrial and Labour Information*, vol. ii, p. 255, and vol. xiii, p. 373.

Court by the procedure defined in Art. 55 of the Supreme Court Act.[1]

The questions submitted for the opinion of the Court were:

(1) What is the nature of the obligation of the Dominion of Canada as a member of the International Labour Conference, under the provisions of the Labour Part (Part XIII) of the Treaty of Versailles and of the corresponding provisions of the other Treaties of Peace, with relation to such draft conventions and recommendations as may from time to time be adopted by the said Conference under the authority of and pursuant to the aforesaid provisions?

(2) Are the legislatures of the provinces the authorities within whose competence the subject-matter of the said draft convention in whole or in part lies and before whom such draft convention should be brought, under the provisions of Art. 405 of the Treaty of Peace with Germany, for the enactment of legislation or other action?

(3) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the legislatures?

(4) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the Parliament of Canada?

Counsel appeared at the hearing on behalf of the Dominion and of the Provinces of Quebec, Ontario and Nova Scotia. No account is given in either the Dominion Law Reports[2] or the Supreme Court of Canada Reports[3] of the arguments advanced, but their general tenor is indicated by the following extract from the June 1925 number of the *Labour Gazette*, the official publication of the Department of Labour, Ottawa:

It was contended on behalf of the Dominion Government by Eugene Lafleur, K.C., of Montreal, and J. G. O'Donoghue, K.C., of Toronto, that no obligation rested on the Dominion to enact into law the different draft conventions or recommendations which may be adopted from time to time by the International Labour Conference, and that the obligation of the Federal Government was satisfied if the different recommendations or conventions were brought before the competent authority, Dominion or Provincial, as the case may be. In regard to the eight-hour day convention, adopted by the International Labour Conference in 1919, an Order in Council was passed in November 1920, on the advice of the then Minister of Justice, declaring that the proposals contained therein were within Provincial jurisdiction excepting as to Dominion works and undertakings. The Convention in question was considered at a conference between representatives of Dominion and Provincial Governments three years later. Doubt was expressed by some of the Provincial representatives in attendance at this Conference as to the soundness of the view expressed in the Federal Order in Council of November 1920. The Supreme Court reference is intended to secure an authoritative expression of view as to whether the eight-hour day convention referred to is within the Federal or Provincial sphere of control. The argument of Mr. Lafleur supported the position which was taken by the Hon. C. J. Doherty, former Minister of Justice, in the Order in Council of 1920.

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[1] International Labour Office, *Official Bulletin*, vol. x, No. 2, at pp. 28–30.

[2] [1925] 3 D.L.R. 1114–17.

[3] [1925] S.C.R., 505–12.

Mr. Geoffrion, K.C., of Montreal, on behalf of the Attorney-General of the Province of Quebec, supported the view of the Dominion Government that the regulation of hours of labour was exclusively within Provincial control under the British North America Act as affecting directly the civil rights of both employers and workmen.

Edward Bayly, K.C., appearing for the Attorney-General of Ontario, argued that the Dominion Parliament has exclusive power to sanction ratification of the draft convention of the International Labour Conference, and that if a draft convention is formally ratified, thereupon becoming binding upon the Dominion, a further obligation will rest upon the Dominion authorities to take whatever action is necessary to make its provisions effective. In the absence of ratification of the eight-hour day convention by the Federal authorities, it was contended on behalf of the Province of Ontario that its subject-matter is probably within Provincial legislative control.

Mr. Mathers, K.C., appearing for the Attorney-General of Nova Scotia, supported the Ontario Government in the view that the responsibility in regard to the eight-hour day convention rested upon the Federal authorities.[1]

The opinion of the Court, which was unanimous, was delivered by Duff J. on June 10, 1925. Referring to Art. 405(5) he said:

> It seems very clear that the duty arising under this clause is not a duty to enact legislation or to promote legislation; it is an undertaking simply to bring the recommendation or draft convention before the competent authority.

Then comes a reservation of some importance:

> No question is submitted as to the duty of the Member arising under the succeeding clauses of the same article in the event of the competent authority or authorities giving its or their consent to the recommendation or draft convention; and upon this no opinion is expressed.

Then follows a discussion of the distribution of legislative authority under the British North America Act in respect of the regulation of hours of labour. This discussion is later summarized in the words:

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[1] *The Labour Gazette*, Ottawa, June 1925, at p. 563.

> It follows from what has been said that the draft convention ought to be brought before the Parliament of Canada as being the competent legislative authority for those parts of Canada not within the boundaries of any province; and if servants of the Dominion Government engaged in industrial undertakings as defined by the convention are within the scope of its provisions, then the Dominion Parliament is the competent authority also to give force of law to those provisions as applicable to such persons.
>
> The convention should also be brought before the Lieutenant-Governor of each of the provinces for the purpose of enabling him to bring it to the attention of the Provincial Legislature as possessing, subject to the qualification mentioned, legislative jurisdiction within the province in relation to the subject-matter of the convention.

Then comes the statement of conclusions:

> The answers to the questions submitted are, therefore:
>
> (1) What is the nature of the obligation of the Dominion of Canada as a member of the International Labour Conference, under the provisions of the Labour Part (Part XIII) of the Treaty of Versailles and of the corresponding provisions of the other Treaties of Peace, with relation to such draft conventions and recommendations as may be from time to time adopted by the said Conference under the authority of and pursuant to the aforesaid provisions?
>
> To the first question: the obligation is simply in the nature of an undertaking to bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.
>
> (2) Are the legislatures of the provinces the authorities within whose competence the subject-matter of the said draft convention (copy of which is herewith submitted) in whole or in part lies and before whom such draft convention should be brought, under the provisions of Art. 405 of the Treaty of Peace with Germany, for the enactment of legislation or other action?
>
> To the second question: yes, in part.
>
> (3) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the legislatures?
>
> To the third question: the subject-matter is generally within the competence of the legislatures of the provinces, but the authority vested in these legislatures does not enable them to give the force of law to provisions such as those contained in the draft convention in relation to servants of the Dominion Government, or to legislate for those parts of Canada which are not within the boundaries of a province.

(4) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the Parliament of Canada ?

To the fourth question : the Parliament of Canada has exclusive legislative authority in those parts of Canada not within the boundaries of any province, and also upon the subjects dealt with in the draft convention in relation to the servants of the Dominion Government.[1]

No appeal was taken to the Judicial Committee, and the opinion has several times been referred to by representatives of the Canadian Government at meetings held under the auspices of the International Labour Organization as though it finally disposed of the question of the extent of Dominion competence.

Yet even a casual reading of the text of the opinion shows that this is not so. The questions submitted to the Court were worded in a most unfortunate manner, and the result was that none of the points of real substance involved in the application to Canadian conditions of Art. 405 was adequately brought to its attention. The direct question : " Is the Dominion competent under any provision of the British North America Act to enact legislation giving effect to the Convention ? " was never properly before the Court. The Court was asked two things : whether Canada's obligations would be fulfilled by the reference of Conventions to the bodies with legislative jurisdiction over them ; and whether the Provinces had legislative jurisdiction, and if so within what limits, over the subject-matter of the Hours Convention. But to state the problem in this way is to sidetrack all the points of substance involved. It can only be handled adequately if the questions are stated a little differently and, above all, are taken in the reverse order.

The first question for consideration is the constitutional one of whether the Dominion would be competent to legislate to give effect to a Convention which it had ratified or proposed to ratify—that is to say, whether its powers under s. 132, though not exercisable to give effect to its obligations under Art. 405, could properly be employed in the event of the Dominion authorities determining upon ratification of a particular Convention. The opinion of the Supreme Court does not discuss this, the really vital constitutional issue. The words—

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[1] [1925] 3 D.L.R., 1114–17, [1925] S.C.R. 505–12, *The Labour Gazette*, Ottawa, July 1925, at pp. 671–2, or International Labour Office, *Official Bulletin*, vol. xi, No. 1, 16–18.

> No question is submitted as to the duty of the member arising under the succeeding clauses of the same article in the event of the competent authority or authorities giving its or their consent to the Recommendation or Draft Convention ; and upon this no opinion is expressed—

might be read as expressly reserving it, but for the difficulty, perhaps the outcome of a merely verbal slip, that as the Provinces are subsequently declared to be the competent authorities the Dominion would not appear to be, in the view of the Supreme Court, called upon, or perhaps even entitled, to consider the possibility of ratification.

If the constitutional question is resolved in favour of the Dominion, as it will be submitted below that it must be, it becomes necessary to consider the international one of whether in a federal State in which the Provinces have normal legislative jurisdiction over a given subject-matter, but in which the Federation has power to assume and give effect to treaty engagements upon subjects otherwise within Provincial jurisdiction, the phrase " the competent authority or authorities " used in the Treaty refers to the authorities which have normal legislative jurisdiction but action by which can never, short of divine intervention, lead to a single ratification, or whether it must be understood to refer to the authority entitled to give effect to treaty engagements. Upon this question the opinion of the Supreme Court of Canada is far from decisive. It is unnecessary to insist that it has no international authority, exclusive jurisdiction over questions involving the interpretation of Part XIII being vested in the Permanent Court of International Justice.[1] The opinion is not even a decisive authority as a matter of Canadian municipal law. The question came before the Supreme Court by reference by the Governor in Council under s. 55 of the Supreme Court Act.[2] This section states plainly that opinions given under it are advisory only,[3] and this has been emphasized by the Judicial Committee. In *Attorney-General for Ontario* v. *Attorney-General for Canada*,[4] the validity of the section was attacked on behalf of the Provinces, and Earl Loreburn, L.C., who delivered the judgment of the Board, while rejecting the Provincial contention, stressed the importance of the Executive using with caution its power to refer matters to the Supreme Court, and remarked : " but the answers are only advisory and will have no more effect than the opinions of the Law Officers." [5] This amounts to saying that such answers are authoritative to the extent to which they are convincing and no farther. To treat them in this manner does not imply acceptance of the attitude advanced on behalf of the Provinces in *Attorney-General for Ontario* v. *Attorney-General for Canada*. It is compatible with a belief that the giving of advisory opinions is a function which a court of justice may properly perform, but it does deny to such opinions the effect of binding precedents in any circumstances or any great title to respect in any case in which it is shown that material aspects of the questions submitted were not brought to the attention of the court or that interested parties were not given the facilities to express their views which the court has power to grant. In the Hours of Labour reference, neither of these last conditions was fulfilled. The question of whether an intention to ratify would justify Dominion legislation was, despite its fundamental importance, left on one side, and the Court did not attempt to use its powers under s. 55(4) of the Act to give the international bodies interested in its decision an opportunity to express their views. It is not altogether irrelevant that the Statute of the Permanent Court of International Justice, which in virtue of Art. 423 of Part XIII of the Treaty of Versailles has exclusive jurisdiction to interpret the Constitution of the International Labour Organization and the terms of Labour Conventions, provides in the last paragraph of Art. 26 that:

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[1] Art. 423.

[2] R.S.C., 139, s. 60.

[3] Subsec. 4.

[4] [1912] A.C. 571.

[5] *Ibid.* at p. 589.

> In labour cases the International Labour Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

Or, expressed in substantial instead of procedural terms, the Director of the International Labour Office is recognized as having an interest in all such proceedings as the representative of the collective interests of the world community. It would appear that in any case in which a national court is called upon to consider the relation to its own law of any of these instruments, it would be desirable for it to advise itself as to the international implications of the questions before it by hearing a representative of the Director of the International Labour Office. The fact that an international organization could not be bound by any decision of a national court is immaterial, for it would be to the advantage of all concerned that the Director of the International Labour Office should be in a position to advise the court upon subjects peculiarly within his competence without being bound by its decision. In a case in which the enactment under which a court has jurisdiction expressly empowers it to grant such facilities, as s. 55(4) of the Supreme Court Act does in the case under discussion, it is particularly regrettable that the opportunity should not be taken of having the international aspects of the question before the court fully explained.

In view of the indecisive character of the answers given by the Supreme Court, it may be useful to re-examine the question on a new basis and to consider in turn: (*a*) whether an intention to ratify a Convention would confer upon the Dominion jurisdiction to legislate under s. 132 of the British North America Act; and (*b*) whether, if such an intention would confer jurisdiction, the procedure at present followed by the Dominion Government to discharge its obligations under Art. 405 is an adequate fulfilment of those obligations.

[*To be continued.*]

MODERN ETHNOLOGICAL JURISPRUDENCE IN THEORY AND PRACTICE.

[*Contributed by* DR. JUR. LEONHARD ADAM[1]].

Definition.—Ethnological jurisprudence is a combination of two terms denoting a special science which belongs to both ethnology and jurisprudence. The German term was introduced in 1886 by the German scholar Albert Hermann Post in his book *Introduction to the Study of Ethnological Jurisprudence*. But Post's first publication on the subject had appeared already in 1872. He also introduced the English term "ethnological jurisprudence," which was the title of a short paper published in the journal *The Monist*, Chicago, 1891. I have to observe, however, that in 1920 in Germany, the birthplace of this science, the term was given up at my suggestion and replaced by the term "ethnological investigation of law" or "ethnological science of law." In the German terminology the term "jurisprudence" is still used in the original Latin sense, that is to say it denotes not a *scientia* but a *prudentia*, i.e. *ars boni et æqui* according to the definition given by Celsus. But in Anglo-American terminology "jurisprudence" has a much wider sense.

The only Italian representative of this special branch of science, Professor Mazzarella of the University of Catania, prefers the term "*etnologia giuridica*," which became the pattern for the French term "*ethnologie juridique*." The English terms are "anthropological jurisprudence" and "primitive jurisprudence" as used by Professor Malinowski, but we shall see that "primitive law" in the proper sense of the term is by no means the only subject of ethnological or anthropological jurisprudence.

It seems to be the fate of such composite sciences that neither of the sciences composing it wishes to deal with it, or each claims to include it. Concerning ethnological jurisprudence during the early part of its existence both jurisprudence and ethnology disowned it. Especially no lawyer wanted to deal with ethnological jurisprudence, considering it as something like a scientific cabinet of curiosities. Josef Kohler, whose first article on ethnological jurisprudence appeared in 1881, was the only university professor who dared teach ethnological jurisprudence ; however, he did not do so openly, under the title "ethnological jurisprudence," since he would hardly have got a single student. But he treated ethnological jurisprudence in his course on the philosophy of law which he extended to what he called "universal history of law." His colleagues considered his interest in ethnology merely as his hobby. Nowadays writers on the history of law consider ethnological jurisprudence, or better, that part of it which concerns primitive law, with considerable respect even if they mention it only in a footnote. Practical lawyers in all countries, however, still show a lack of understanding, praising the ethnological jurists as good ethnologists, while conversely the ethnologists, who have mostly an aversion for jurisprudence, denote them respectfully as certainly good lawyers. The interest of ethnologists or anthropologists in ethnological jurisprudence, that is to say in primitive law, is increasing from year to year since anthropology or ethnology has to consider all sides and all the single phenomena of culture. It should be a principle of ethnological jurisprudence that its representatives have both juridical and ethnological training. But this qualification exists only in very few cases. Consequently we find that some modern ethnologists show their contempt of what is just the basis of jurisprudence, namely juristic classification and terminology. They confine themselves to analysing the psychological conditions of legal institutions, which is undoubtedly a very important part of ethnological jurisprudence, but does not exhaust it. It is to be admitted that ethnological jurisprudence requires rather more ethnological knowledge than a European legal training can give, and for one of the best works in this branch of science we are indebted to a pure ethnologist, Professor B. Malinowski, of London University. His book on *Crime and Custom in Savage Society* is an excellent illustration of primitive legal development and should be read, as a supplement to the history of law, even by such lawyers as are not particularly interested in ethnology.

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[1] Dr. jur., Editor of the *Zeitschrift für vergleichende Rechtswissenschaft*, formerly Reader in Ethnological Jurisprudence in the "Institut für Auslands- und Wirtschaftsrecht," University of Berlin. This paper is a summary of a lecture given on February 28, 1934, being the first part of a course on ethnological jurisprudence delivered at the London School of Economics and Political Science, University of London.

Relation between Ethnological Jurisprudence and Sociology.—Law is a social phenomenon. Therefore I cannot resist anticipating here a few words about the relation between ethnological jurisprudence and sociology. There are nearly as many kinds of sociologies as there are sociologists, and it cannot be denied that "sociology is still far from the definiteness and unity that characterize the older social sciences."[1] But nevertheless sociology exists, as well as practical law and legal science, though there are likewise as many definitions of law as there are philosophers of law. Some time ago the suggestion was made, that sociology should be restricted to the study of civilized nations. This proposal is strongly reminiscent of King Alexander and the Gordian knot. Setting aside here the fact that a special literature would be necessary to state when and where civilization began—restricting sociology to the peoples of higher culture would be the same thing as an architect's neglecting the foundation of a building and attempting to start from the first floor, or an anatomist's not studying the intestines. In reality, ethnology, ethnological jurisprudence and sociology deal partly with the same subject, studying it, however, for different purposes, from different points of view and by different methods. The sociologist considers social phenomena only. His purpose is not historical but analytical, he studies the psychological and economic conditions of the various forms of human society. The final purpose of ethnological jurisprudence is the study of the growing and varieties of the idea of law and of the various legal institutions composing a legal system with special consideration of the non-European cultures. It is partly a supplement to the history of law; but, at the same time, it belongs to the social sciences too. Over twenty years ago Josef Kohler pointed out that the social life of the communities is the basis of the development of law, that consequently a sharp distinction between the various social sciences is impossible and that he who knows nothing of ethnology can never find his way in the history of law. But on the other hand, legal institutions, once in existence, have their own technique, and likewise the idea of justice is a special phenomenon which requires a special study beyond the range of both ethnology and sociology.

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[1] Edwin R. A. Seligman, in the *Encyclopædia of the Social Sciences*, New York. 1930, vol. i, p. 5.

Civil Procedure in the Makonde Tribe.—There are still many people who give you a look of astonishment and ask you if savages do have laws at all. To such a doubtful question my answer is to give a practical example which may be less dry than a theoretical explanation. The report in question was made between 1908 and 1913 by Mr. K. Orth and concerns the Makonde tribe in the south-east of the present Tanganyika territory.)[1] It is a report on civil procedure in this tribe running as follows:

"If a Konde suffered any damage through the fault of somebody else he is entitled to a reparation of this damage consisting of a payment in cattle. In order to obtain this payment the creditor at first tries to induce the debtor personally to settle the case. If the parties cannot come to an agreement as to the amount or the debtor avoids a personal discussion or delays payment, the creditor will look for an advocate. The advocate must be a good speaker and a clever fellow too. To which tribe he belongs is immaterial. The first thing to be done is to pay an advance on the fees to the advocate or at least to agree with him upon a fixed amount payable after settling the case. If this is in order, the advocate goes to see the debtor, urging him by friendly challenges, reproaches or even threats until he acknowledges his debt. If, notwithstanding the endeavours of the advocate, the debtor refuses to pay, the claimant will address himself to the elder members of his own family, according to the importance of the case. These men try to summon the respondent and to mediate between him and the claimant. If these methods also have no success, another advocate is taken and sent to the respondent's family in order to put the case to them again. The other party will appoint an advocate too if it is an important case. It is very seldom that the negotiations lead quickly to a result. Generally the parties, assisted by their advocates, quarrel and negotiate for several days. On each side they refer to all the essential and historical points of view to invalidate the resistance of the adversary. The advocate of the claimants usually divides his arguments into an explanatory part and a threatening one. Only if all the legal arguments fail and the other party will not agree, the advocate takes more energetic steps. He emphasizes the high reputation of the claimant, points out the influential position of his numerous relatives and finally describes the difficulties they are likely to make for the respondents. If even this is unsuccessful, a feud is declared. The claimant's party try to seize, by force, if necessary, slaves or even members of the other party and in this way to force the respondent's hand. This is always the last resort of justice in every case, however trifling the offence. A successful advocate was very well paid, as a matter of course. It often happened that a case could not be settled without an advocate and consequently the advocates were highly valued. If they were successful they became rich men very soon and got a high reputation. The fees of an advocate were not fixed in amount and sometimes were out of all proportion to his services. For a claim made for a lost slave a goat was often paid. The advocate would only deal with a claim energetically after receiving some payment in advance to spur him on."

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[1] See the publication of the official records on native laws of the German colonies entitled *Das Eingeborenenrecht*, edited by E. Schultz-Ewerth and Leonhard Adam, (Stuttgart: Strecker & Schroeder), vol. i, 1929, pp. 337 *sq*.

This story is extraordinarily interesting because it shows both primitive and more developed features. The co-operation of kinship in the settling of claims is typically primitive and so is the feud between the two parties without any interference of a tribal authority, which does not exist among the Konde. Their highest social unit is the clan, composed of several families and mostly being, at the same time, a local group. The mere possibility of negotiations for settling claims is certainly a proof of higher development, as is also the existence of advocates though it is probably an original institution of the tribe. As a whole the procedure is not very primitive here and thus we see that within the sphere of ethnological jurisprudence, contrary to the allegation of some anthropologists, there are sometimes possibilities of comparisons with European law.

Ethnological Jurisprudence is a Part of Comparative Jurisprudence.—Comparative law is only a conception of the nineteenth century although we can trace its beginnings in a book entitled *Entwurf einer juristischen Encyclopædie und Methodologie* (Outlines of Juridical Encyclopædia and Methodology).[1] These beginnings of comparative law were associated with the German historical school of jurisprudence which was the result of the revival of interest in the old Germanic law and the reaction against the purely Romanistic jurisprudence of the preceding centuries. But even this school was far from considering ethnological aspects, with a single exception as we shall shortly see. The first scholar who suggested studying the laws of the ancient oriental nations was Johann Stephan Puetter in 1767. Thibaut, a contemporary and a colleague of Savigny, suggested an extension of legal studies to all the legal systems of past and modern times including Chinese law. Edward Gans in his book on inheritance (1824–1825) gave a detailed survey of what was known in those times of Indian, Chinese, Mosaic, Talmudic and Mohammedan law of inheritance. As to ethnological jurisprudence in the sense of an investigation of primitive law, it is generally believed that J. J. Bachofen, whose book on the mother-right appeared in 1861, was the founder of this branch of comparative jurisprudence. I think it was Kohler who was the first to express this opinion. But yet it is a mistake. The first to consider primitive law was K. Th. Puetter in his book *Der Inbegriff der Rechtswissenschaft.*[1] Puetter tried to trace the earliest stages of human society by referring to the biblical records of tribal law and social life of the ancient nomads, which he compares with the facts collected by eighteenth- and nineteenth-century explorers of Africa and the South Seas. However, in spite of Puetter's interesting lead nobody followed up his suggestions. The epoch of great discoveries at the end of the eighteenth century, James Cook and others, the discovery of peoples uninfluenced by European civilization, afforded rich suggestions to philosophy and to romantic poetry but not yet to legal history. Bachofen's work requires a few observations here. He was a Swiss judge, but a professional philologist too, and he was particularly interested in European classical antiquity. It is true that he was the discoverer of the *Mutterrecht*[2] and that his book had an enormous influence on the development of ethnological jurisprudence. But this influence was only an indirect one since Bachofen made no mention of living primitive peoples. Unfortunately his book belongs to that class of famous works which are often cited but never read. He who can make up his mind to read the book will find that Bachofen dealt with antique peoples only except for one chapter where he compares some institutions of the Peruvian Inca State with ancient Egyptian law, and a few other passages concerning India and Tibet. Bachofen's discovery of a family-organization, which was altogether different from both Roman and Germanic patrilinear systems, exercised its influence on jurisprudence and history of law only after the appearance of the works of Spencer, Tylor, Lubbock, and Morgan, who, on their part, were under the influence of Darwin's ideas. Sir Henry Maine, A. H. Post and J. Kohler, the real founders of ethnological jurisprudence, were partly under the same influence of Darwinian evolutionism. But Kohler (1849–1919), who published no less than some thousands of books and papers, was not in all his theories so far removed from modern ethnology as is generally believed. He told me several times that he knew very well that the researches performed by modern anthropologists had to a considerable extent changed the basis of facts on which, for instance, his theory of group-marriage was based. But a great part of Kohler's theories is still of practical importance. It was Kohler who pointed out the importance of primitive religion and belief in magic in the development of primitive law, and who introduced into ethnological jurisprudence a correct method of denoting social institutions by native terms, thus avoiding forcing primitive institutions into the terminology of Roman jurisprudence.

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[1] By August Friedrich Schott. Leipzig, 1772.

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[1] Berlin, 1846.

[2] "Mother-right" is an incorrect and misleading translation of *Mutterrecht.* The correct translation is "matrilinear system."

Ethnological Jurisprudence has Two Altogether Different Meanings.—In a methodological sense of the term it is the investigation of the interaction between law and the other elements of a specific culture. The other meaning is simply the investigation of the laws of those peoples who are the subject of ethnology or anthropology; in other words, the investigation of the laws of the simpler peoples or of the more or less primitive peoples. There can be no doubt that anthropology or ethnology has to consider all the phenomena of social life and consequently custom and law too. On the other hand, the investigation of primitive law belongs to jurisprudence in the widest sense of the term. It is concerned with the early stages in the history of law. The only German scholar who tried to insert ethnological jurisprudence into the range of legal systems was Kohler. Another German writer, Wilutzky, considered the investigation of primitive law only as " prehistory of law." This is apparently also the opinion of Professor John Henry Wigmore, who recognizes sixteen " legal systems " of all periods and countries but only of the high cultures. On the other hand, Sir Paul Vinogradoff in his *Outlines of Historical Jurisprudence* dealt with what he called " tribal law " as the first stage of legal development. The enormous work of Professor Giuseppe Mazzarella in Catania on ethnological jurisprudence is based on Indian material only. He holds an altogether unique position as he believes it possible to trace all the stages of legal development in the history of Indian law alone. Now I would like to stress the fact that I am not dealing with India here, although there are primitive peoples living in some Indian provinces too. Indian law as a whole, however, embraces some highly developed legal systems ranking with Roman law, though, of course, altogether different.

Ignorance of Native Law and Custom.—Some thirty years ago continental jurisprudence was confined to a merely theoretical conception of ethnological jurisprudence. Native law and custom were rather neglected by European authorities. The conflict between European civilization and native cultures was not nearly so strong as it has been within these last thirty years. But the ignorance of tribal organization and customary law caused much friction. Moreover the under-estimation of the moral qualities of many tribes was certainly to be attributed to ignorance of primitive mentality and customs. When James Cook arrived at the North-west Coast of America he needed some fresh grass for the sheep and goats he had on board and sent some of the crew to cut it. While they were at work an Indian approached them and impressively exclaimed the word " makuk." After a while the sailors understood that the native wanted them to pay for the grass and they gave him something in exchange for it. Then another native approached who explained to them that *he* was the owner of the grass and repeated the request for payment. After him a third man came and so on. In the opinion of the sailors nobody seemed to know who in fact was the owner or else they were all liars. It did not occur to them that the land was owned by the whole Nootka tribe and not a single individual.

Another example. Among the German farmers in South-west Africa the Hereros were noted for their thieving propensities because if a native saw anything belonging to somebody else which he needed himself, he took it at once. The natives themselves were very suspicious of each other. For instance, chief Maharero was compelled to wear his two or three pairs of trousers in summer as well as in winter, as otherwise he feared that somebody else would put them on. Now, in the German official records of native law in the German colonies, Herr von Zastrow explains the altogether different legal and moral principles of the Herero as follows : The Herero will never admit to have stolen. He will say that he borrowed the thing, and if you tell him that it was wrong he will reply : " Why should I not take it ? You have got so many needles and I was just in want of one to sew the tear in my cloth." But if his boss possesses only one needle he will not take it. And if he takes some matches to light his pipe he will not take the whole box but will always leave four or five matches in it. Zastrow, who lived a long time among the Herero, is quite right to denote such conceptions as " collectivism " ; but it was always leading to quarrels with the farmers, who, as a rule, were very far from an understanding of primitive mentality.

I cannot give a complete list of all the more or less tragic misunderstandings which arose from an almost complete ignorance of native law in different colonies. The most important question was to ascertain who was the owner of land and who was entitled to dispose of it. For instance, it seems certain that, according to Herero legal conception, land was not saleable at all, but could only be lent. Thus the English translation of the treaty between the Herero and the Nama tribes, dated September 23, 1870, para. 4, runs as follows : " The Herero chiefs give by way of loan to Jan Jonker Afrikaner the place called Windhuk for himself and his people to live on with a missionary of the Renish Society." So far as I am informed the problem of land tenure in South Africa is not yet satisfactorily solved. This problem and other questions of native law require certainly either anthropologists with a training in law or lawyers with a training in anthropology. But one fact must be pointed out here. There were and, I suppose, there are disputes on legal questions among the natives themselves, otherwise there would hardly exist such well-organized rules of procedure as are found all over Africa. And in particular land tenure was sometimes contested, at least powerful chiefs abused their power. Again our friend Samuel Maharero gives us a good example. He was very fond of alcohol, and consequently he was in a permanent want of money. In order to get it he sold the cattle of all his relatives and moreover claimed the right to sell the land of the tribe. So he forbade his people to cultivate gardens and to sow corn at Okahandya, since otherwise he feared to have troubles when selling the land. The petty chiefs were obliged to obtain a decree from the government which stopped his little game.

For a long time native law was studied only from a scientific point of view, but it was observed—not without satisfaction—that the results of this new branch of science were, at the same time, a useful source of information for colonial civil service and army officers. Colonial officers themselves as well as missionaries collected the greater part of the records concerning native social life, and this became the material for a sociological and juristic analysis, long before modern ethnology was developed and before field-work of modern trained anthropologists became possible. It is true that many reports delivered by scientific laymen show a lack of understanding of primitive mentality. But for many absolutely trustworthy and exact reports we are indebted to non-professional British and German ethnologists, both officers and missionaries. A special talent is necessary to understand primitive mentality and to gain the confidence of the natives.

Investigation of Native Law.—We find, in short, that the first practical purpose of the investigation of native law was to supply information for reasonable intercourse with the natives and avoid misunderstanding and administrative friction. The German endeavours from this point of view began in 1888. Felix Meyer, a judge at the Prussian Supreme Court, who published an excellent book on the economy and tribal law of the Herero tribe,[1] found another useful purpose to which the investigation of native law could be put. He understood the necessity not only for studying native law, but also for making it suitable for the future development of the legal systems of the colonies by arranging a codification. For this purpose he renewed a suggestion made in 1888 by Dr. Hammacher, a member of the German Parliament, that the German government should order an exhaustive collection of records of the native law in all districts of the colonies in both Africa and the South Seas. On May 2, 1907, a vote of Parliament requested the government to complete the collection as soon as possible, and consequently during the period from 1907 to 1914 about 100 reports were delivered. The government distributed among the district magistrates and missionaries copies of a list of queries worked out by Professor Kohler, which had been published in vol. XII of the *Zeitschrift für vergleichende Rechtswissenschaft*. This list contains an instruction in the form of very simple and clear questions on all important subjects. The committee for the management of the undertaking was composed of both lawyers and colonial officers, and anthropologists. Owing to the outbreak of the war, however, the enterprise could not be finished. The material was published in 1929 and 1930 as a scientific work with the special purpose of showing the state of native law before European influence. Practically native law, in particular civil law, that is to say family-law and property-law, and, to some extent, native rules of procedure, were actually in force in the German colonies. The administration of Samoan Islands and of Adamaua, Cameroon, was almost entirely in the hands of the natives themselves; in Samoa the special patriarchal form of government arose quite spontaneously from the conditions existing.

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[1] *Wirtschaft und Recht der Herero*, Berlin, 1905.

European Influence on Native Law.—Considering that law is subject to permanent change like all other cultural phenomena, it is evident that the study of European influence upon native law and of the conflict between native social organization and modern economic and social conditions in the colonies is of no less importance in the history of law than the investigation of the original features of native law. For practical purposes study of the present condition of native law is the only road towards establishing a reasonable basis for native policy and for legislation. It is true that the classification of single social and legal phenomena and the definition of exact terms remain unavoidable requirements also for modern ethnological jurisprudence. But more important is the investigation of the psychological and economic conditions of law. This seems to me to be the leading thought in modern British ethnological jurisprudence. Malinowski's book on *Crime and Custom*, although it is confined to the Trobriand Islanders, should be considered as the most remarkable publication on primitive law in modern literature. His observations on the binding force of economic obligations and on reciprocity as the basis of social structure do not, it is true, exhaust the aims of jurisprudence in the proper sense of the term, but are excellent psychological explanations leading to a profound understanding of the underlying principles of customary law. In connexion with this book I may draw the attention of jurists to a French paper published by R. Lenoir in the *Revue Philosophique de la France et de l'Etranger*, 1924, Nos. 3 & 4, on primitive contracts, entitled "Sur l'institution du potlatch."

The best way to show how very important it is to study the native law as it is now under the influence of European civilization and to adapt legislation to the new social conditions is to cite some reports based on personal experience in various African districts. The contact with European life, the administration by European authorities and the removal of the younger people from their families and tribal communities to the districts of European industry are the sources of a tremendous change of native mentality and society. Starting from these facts Mr. D. S. Knak, a German missionary, in his paper on the influence of

European civilization on Bantu family life[1] makes the following statement :

> The young people return from the large towns to their homes with undesirable habits and ideas of emancipation which express themselves chiefly in lack of respect for the older people and opposition to old tribal rules. In their eyes the chief is the embodiment of backwardness. But some of the people who have lived a long time among Europeans return willingly on their marriage to the old conditions. Then a transition stage is sometimes reached, especially when husband or wife has been baptized, because conflict arises between European Christian and African pagan ways of life and there is a feeling of injustice on both sides. Many administrations have been forced in these circumstances to have recourse to law to restore order, thus furthering the gradual substitution of European conditions. There is, however, no uniformity in the legislation for the natives. *E.g.* in one area native marriage will be recognized as marriage, in another it will be regarded as concubinage. There is great diversity in the laws concerning divorce, a woman's majority, community of property, right of succession, and so on. Native law and custom are more closely followed in Natal, where a native code has been published.

Knak, although he is a missionary, suggests that native marriage should be recognized as a real marriage, and that the wholesome elements in native customs (consciousness of mutual responsibility, respect for community rights), which have their roots in the past, must be partly maintained by founding them on Christian ideas, thus purifying and bringing them to a higher level of development. Very instructive is another article written by an educated East African native named H. M. T. Kayamba under the title : *The Modern Life of the East African Native.*[2] I shall confine myself to quoting a few sentences : " Charity and hospitality are disappearing. The elder is only respected by the nearest relatives and his help is sought in few cases. Young men have a saying : ' The old men's days have passed.' Marriage is no more lasting and there is very little happiness in it. It is not so much regarded as the sacred life of the family as before. Divorces have increased 100 per cent. within a few years. Adultery and fornication are in the ascendancy at the same rate. In most cases European requirements have exceeded the African's earning power ; the result is that women are dissatisfied with what they can get from their husbands and parents and are easily enticed by those who can supply their wants but do not intend to marry them. Wives do less work than before. Children do even less." Furthermore Kayamba notes the disappearance of the system of inheriting widows (the levirate), pointing out that this inheritance was, in some places, a mere formality. He says that " this system had its beneficial use in Africa, being part of the communal system which has not made room for poor people who depend on the community to support them. When this system breaks up entirely in Africa it will cause a great gap in the African

[1] *Africa*, vol. iv, 1931, pp. 178–200.

[2] *Africa*, vol. v, 1932, pp. 50 *sq.*

family life which is sure to affect it considerably."[1] Similar deplorable facts have become known from other parts of Africa. As to Oceania the degeneration of native society is accelerated by the decrease in population and, in Mikronesia and Polynesia, by the increasing immigration of the Japanese too. It seems that, except in New Guinea and partly in Melanesia, the disappearance of native culture is but a question of time. With regard to the considerable difference in the grades of civilization in the South Seas it is obviously impossible to treat native social organization and native law homogeneously here. Only the Polynesians seem to be able to reach a European standard of education and to co-operate in administration, as is the case of New Zealand where original native law is no longer of importance. The field where our problems are real is New Guinea and Melanesia. Although the culture of the tribes is comparatively primitive there are some institutions in Melanesian law which are obviously of practical importance also in modern economic life. I am thinking here of the protection of property by magic, as the kaytapaku and the gwara[2] of the Trobriand Islanders described by Professors C. G. Seligman and Malinowski. Here we find merely psychological sanctions but economic effects. The practical use of such institutions also for future economic and legal development cannot be underestimated.

Indirect Rule.—As matters stand all colonizing powers have a considerable interest in the investigation not only of native law but also of the decisive factors in the conflict between native law and European culture. But practical life and policy cannot wait for the results of scientific consideration, however important they may be. There exists a system of government in the British African colonies which is obviously the only possible way of adapting native culture to the modern conditions of life. It is the indirect or dependent rule built up by Lord Lugard on the basis of the Native Authority Ordinance of 1914. Malinowski in his article on *Practical Anthropology*[3] says that, if we define dependent rule as the control of natives through the medium of their own organization, it is clear that only dependent rule can succeed, because "it is infinitely preferable to achieve development by a slow and gradual change from within." Stephen Roberts in his article on native policy in the *Encyclopædia of the Social Sciences*[4] observes that "the ultimate confirmation of the merits of Lord Lugard's system is provided by the fact that in the north of British Nigeria one British political officer suffices for 100,000 natives and in the south for 70,000." Moreover, he mentions that at the time of the International Congress of 1921 all the European colonial powers had arrived at a similar basic policy. The legal basis of indirect rule is a mixture of British law with African native law and Mohammedan law. As a rule, the native tribal organization was maintained. Lord Lugard himself in his address delivered on January 10, 1933, at the London School of Economics[1] points out that the tribal system was an effective instrument in maintaining unity and discipline in each community, and that its code of communal obligations, and of land tenure, was successful in preventing individual destitution or professional prostitution; its sanctions culminating in the dreaded loss of membership were effective in maintaining tribal standards and discipline. It must be emphasized, however, that indirect rule does not mean the maintaining of the present conditions in the future, but is only a way for the gradual adaptation of native culture to modern conditions of life, "averting social chaos and giving permanence to the new conceptions so that they may seem to grow out of the old." And yet the work of ethnological jurisprudence is by no means finished. I may even say its practical work is about to start. For it will no longer be confined to a mere consideration of native social life and tribal law, but it will require the study and careful consideration of European economics too. If there is a conflict between two or even more altogether different cultures, economic conditions and legal systems—as it is the case in modern Africa, it is evident that it will be insufficient to consider one side only. It seems that indirect rule fulfils our expectations only in such districts as are not yet affected by European industrialization. This opinion is based on such papers as that by Kayamba or Mr. Knak, or on the reports of my friend R. Thurnwald on social changes in East Africa, or still more on Professor Charlotte Leubuscher's German book on the social conditions of native labourers in South Africa, and last, but not least, on the general survey given by Professor Westermann in his book *The African To-Day*. The development of European social conditions showed a transition in remote times from community-life to individualism and, more recently, from individualism to socialism or, at least, to a modern social feeling based on the consciousness of the responsibility of the individual as a member of the whole nation. The native population in Africa and Oceania has to skip the stage of individualism, thus passing directly to a modernized social life. But in the gradual transition from the old order to modern conditions legislation is only of secondary importance, since the basis of social conditions and changes is dependent on *economic* conditions. The force of economic factors and of psychologic factors is in the end always stronger than that of the law. Consequently if we want to prevent the native culture from degeneration, the starting-point must be the regulation of the economic conditions, especially of the progress of industrialization. But this should be done with a careful consideration not only of native but also of European interests.

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[1] Concerning the importance of African polygamy for economy and social life compare Diedrich Westermann (Director of the International Institute of African Languages and Cultures), *The African To-day*, with a foreword by The Rt. Hon. Lord Lugard. (London: Humphrey Milford, Oxford University Press, 1934), pp. 139 *sq*. especially p. 142.

[2] *Kaytapaku*, see Malinowski, *Crime and Custom*, p. 60: "When a man owns coco or areca palms in distant spots, where it is impossible to keep watch over them, he attaches a palm leaf to the trunk of the tree, an indication that a formula has been uttered which automatically would bring down ailment on the thief."—*Gwara*, see *ibid.*, p. 61: "a pole is planted on the reef, and this places a taboo on any export of certain valuable objects," etc.

[3] *Africa*, ii, 1929, pp. 22–38.

[4] Vol. xi, 1933, p. 275.

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[1] *Economica*, no. 41, August, 1933, pp. 248 *sq*.

Abolition of Certain Native Customs.—It is, of course, not desirable and even not in the interest of the natives themselves to maintain all native institutions. It is well known that Africa is one of the birthplaces of slavery and of extremely cruel customs in criminal procedure. There can be no doubt that a complete abolition of cruelties must be an aim of both direct and indirect rule. Here is the real field for missionaries' work. As a whole, only tribal organization and administration, and furthermore family law and laws of inheritance can be maintained in the future, except perhaps for customary commercial law in certain local districts. It is true that primitive mentality differs largely from the European and this fact must be carefully considered in colonial administration and legislation. But it has been proved by modern anthropology, and can be learned from practical experience, that even the primitive man is by no means free from egotism and rationalistic deliberation. Furthermore it is not true that there exists an unsurmountable contrast between European Christian and primitive morality. Dr. Marett was the first to consider the complex of primitive morality in one of his works,[1] wherein he reminds us of " the impartial verdict of history that human nature is neither good nor bad but mixed," and that " the primitive world is less uncharitable than is sometimes believed." On the other hand, we must observe that primitive mankind is likewise familiar with all the human weakness we meet in our own world. It would be a mistake to believe that peaceful harmony existed in primitive society before the European influence. This is proved, for instance, by the history of many Bantu tribes and of almost all Oceanic peoples. Another point of view which requires some consideration in colonial legislation and jurisdiction is the following : even if he is baptized or is a Mohammedan, the African native of to-day is not free from primitive belief in witchcraft and magic influences. During my stay in the Indian prisoners-of-war camp in Rumania, where I collected some records on Indian and Nepalese customary law,[2] I used my spare time to learn the Toucouleur dialect of the Fullani language from a French prisoner, a Senegalese of the Woloff tribe, named Mustafa Sall. Mustafa was a man of high intelligence, he had been in Paris and spoke French rather well. He was Mohammedan, and had had various occupations. Just before the war he was a clerk at St. Louis, Senegal. Mustafa told me all about procedure before a native court in the Woloff territory, and he mentioned the fire-ordeal which is spread over many districts of Africa as a method of trying a charged man, especially a thief. He told me that if the charged man licked a white-hot iron without hurting his tongue it was proved that he was innocent and that consequently he was acquitted. " But, Mustafa," I said, " of course you do not believe yourself in that sort of thing ? " " Of course I do," he replied. " How is that possible," I said, " for you are a clever boy and you were in France and are a modern man, aren't you ? " " Yes," he replied, " but it happened to me personally. When I was in St. Louis, one of my companions lost his silver watch and I was charged with theft. Well, I licked that hot iron, and consequently I was acquitted." " But then, I suppose, you rushed to the hospital ? " I said. " No, why ? " he said. " I was quite all right because I was innocent."

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[1] R. R. Marett, F.B.A. (Rector of Exeter College, Oxford), *Faith, Hope and Charity in Primitive Religion.* (Oxford : The Clarendon Press, 1932.)

[2] See *Man* (R.A.I.), xxxiv, February, 1934, no. 23.

Institutes for the Study of Ethnological Jurisprudence.—I wish to add a few words on the various institutes which are now occupied with studying the theoretical and practical problems of ethnological jurisprudence. This science which was neglected for so long is now studied by jurists, anthropologists and sociologists, and—last but not least—by schools devoted to the training of colonial administrators. In 1931 the Congress of the International Academy of Comparative Law put on its programme for the next congress the study of primitive law and legal folklore. In Paris there exists a bureau for the study of exotic customary law under the leadership of Professor Maunier. Furthermore in Lord Lugard's article on Colonial Administration which was published in *Economica*, No. 41, 1933, we find an enumeration of all British, French and Belgian institutions and lectures concerned with native law. As to Berlin, after Professor Kohler's death in 1919 ethnological jurisprudence and the investigation of native law were neglected at the university until some years ago I had the honour to be appointed lecturer on native law at the Institute of Comparative Law, Berlin University. And furthermore native social life was a permanent subject of the Berlin Seminar of Oriental Languages which is now an institute of the university. Concerning Italy, where a considerable interest in colonial studies exists, I do not know whether the plan of establishing an institute for the study of native law has already been carried out. Finally, I have to mention the International Institute of African Languages and Cultures in London and its journal *Africa*, to show that there exists now a splendid co-operation of British, French and German scholars in the special purpose of studying the actual problems of African native social life and tribal law. I think that the names of Lord Lugard, Professors Labouret and D. Westermann are a guarantee of the successful future of this co-operation in science. And yet we would wish to suggest a stronger activity on the part of the jurists.

THE AFRICAN CONCEPTION OF LAW.

[*Contributed by* J. H. DRIBERG, ESQ.]

Law the Possession and Privilege of a Restricted Group.—Hartland speaks of "lawless men" in primitive society, but the whole tenor of his book makes it quite clear that he meant, not men who are under no law, but those who are outside a particular set of laws. For the law is only applied to and only protects the specific group which recognizes it. Law is part of the whole complex of culture and therefore only those who claim the same cultural inheritance come within the scope of its operations. Each unit—whether that be the family, the clan or the tribe—has its own corpus of customary law which is directed towards maintaining the interests of that unit against all outsiders. These outsiders are really "foreigners" and can claim no protection under the law of the unit, unless they are temporarily protected by the laws of hospitality, in which case they are granted the same status as their host and can plead in his name. So from the unit's point of view all who are outside it are "lawless men"—and fair game for anyone. The idea is exactly the same as that conveyed by the extensions of terminology under the classificatory system of relationship. Within the family all of one age are "brothers," strictly and biologically. Then all within the clan are brothers, as contrasted with all outside the clan. Then all within the tribe are brothers, as contrasted with all outside the tribe. The obligations and privileges which this real or artificial brotherhood confers are confirmed and guaranteed by the law, and consequently all who are not deemed brothers are outside the scope and protection of the law. Therefore all who are not members of the tribe are "lawless men" to that tribe, but no member of the tribe itself can be designated lawless till he has been publicly and legally outlawed. There is little intertribal, or as we might say international, law other than that which governs the making of war and peace and which, during peace, maintains and adjusts economic relations between neighbouring tribes: but there are legal methods by which non-tribesmen may be brought within the scope of tribal law, *e.g.* by intermarriage, blood-brotherhood, the protection of friends, rules of hospitality, intertribal societies and other methods which enable non-tribesmen to plead their cause vicariously.[1]

This, then, is the first point which I wish to make. Law is the possession and privilege of a restricted group. If that group is the tribe, as it generally is, there are four aspects of law which should be considered, if we had the space—family law, clan law, tribal law and associational law. It is sufficient to say, however, that though on certain points, notably marriage, the several codes differ quite markedly, yet on the whole they are complementary to each other and the totality stands for the tribal law which we are now considering.

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[1] See Appendix, p. 244.

Maintenance of Equilibrium.—The second point I want to dispose of before proceeding to the principles which I believe underlie African concepts of law and justice is largely one of terminology. We speak of criminal and civil law, a distinction which is meaningless to the African and fruitful of misunderstanding, when he is pursued in our courts on a criminal charge for what he would consider a civil offence, involving a totally different penalty. If they made the distinction—and certainly some distinction is implicit in their legal practice—they would speak of private and public law. To them law comprises all those rules of conduct which regulate the behaviour of individuals and communities, and which by maintaining the equilibrium of society are necessary for its continuance as a corporate whole. Private law deals with acts which disturb the equilibrium ; public law with acts or situations which negative those conditions which make the maintenance of the equilibrium possible. I shall explain and illustrate what I mean in a moment.

Let us start, then, by discarding European concepts of law and justice. They are not only irrelevant, but any investigation based on them is bound to be fallacious. Our varied laws and procedure and our distinction between civil and criminal law have grown up with European culture and are part and parcel of it : but they have nothing in common with African cultures ; they are alien in growth and sentiment, and cannot be used to explain the bases of primitive legal theory. Our society and its laws are founded on an individualistic assumption : theirs on a collectivist organization. It would be remarkable therefore if the two could have a great deal in common.

On our definition we find that African law is positive and not negative. It does not say " Thou shalt not," but " Thou shalt." Law does not create offences, it does not make criminals ; it directs how individuals and communities should behave towards each other. Its whole object is to maintain an equilibrium, and the penalties of African law are directed, not against specific infractions, but to the restoration of this equilibrium. There is no written code, but the law is an organic growth, inherent in the body politic and accepted just because it is organic, coherent and traditional. In Hartland's words, " primitive law is the totality of the customs of the tribe." It is always constructive and palliative. A crime—to use a convenient, if inaccurate, term—consists in the disturbance of individual or communal equilibrium, and the law seeks to restore the pre-existing balance. The deterrent or purely penal theory does not enter into the question. Even homicide is not punished from that point of view. A member of one family or community has been killed, with the result that the equilibrium has been disturbed. The law steps in to restore it, either by the execution of the murderer or by the payment of compensation. That the murderer may be executed or that the property of his family may be diminished is incidental to the underlying motive, which is in no sense whatever penal.

Principles of Status and Substitution.—At this point I must interpolate a few words on two principles in the social organization of Africans, which are of universal application and which have considerably affected their legal viewpoint. The close integration of African culture, I am afraid, makes such interpolations unavoidable, as it is impossible to comprehend any one aspect of cultural activity in isolation. The principles I refer to are status and substitution. Every individual is born into a certain status relative to all other members of his community. It is not a personal status, as it might be in an individualistic society, and does not imply rank, but reciprocal obligations and benefits which he incurs as a member of the community. All his conduct is conditioned by his status, which is not a permanent one but changes with his age and experience and may be affected by the decease of relatives and the inheritance of new responsibilities. The principle of substitution is a correlative to status, since all of the same status in the community may at any time be called upon to act as a substitute for another member, a principle which, as we shall see, is of considerable importance in African legal theory.

This principle of status partly accounts for the fact to which I have alluded, that in Africa the law does not recognize non-tribalists. To achieve tribal status every tribesman has to submit to certain rites and ceremonies which entitle him to the privileges of the tribe. One who is not a member of the tribe has not undergone those ceremonies and therefore has not the status which would give him legal recognition. Added to this a different religious or magical aura surrounds every tribe and this may be inimical to the tribal interest, which is an added reason for not admitting strangers to full intimacy until they have submitted to a ritual of purification or are vouched for by their hosts, whose status they accept by substitution. For the same reasons certain West African tribes refuse to bury strangers in tribal soil, for fear of the danger of a spiritual clash.

A few instances of how the principle of status works will show how important it may be in legal matters, and incidentally it is possible to trace in it the origin of the practice of legal representation in Africa, where we find it in every stage of development. The Azande afford two good examples of the importance of status. An unmarried man cannot sue the father of a family, but must be represented by one who is himself a father, as there cannot be legal transactions between two people differentiated by status. On the other hand, such is the solidarity of the clan that any member of the clan is entitled to recover a debt due to any other member who is unable to do so himself. Among the Mangbettu it is the head of the group who alone may represent any member of the group in law: a wronged man must consult his elder brother, who will take the case before the head of the family, and the latter will then take it to the head of the village. Representation by a chief or clan head is very general, but a most interesting development is to be found among the Chagga, among whom in each clan besides the spiritual leader there is one who is called "The Great One in Legal Matters," whose function it is to represent the clan members, not as an advocate of an independent party, but as a legal guardian. Before a member of a clan can start a suit, he has to obtain permission from the clan leader and the case is not tried till the latter appears, a point which emphasizes the collective responsibility of the clan. Moreover as the clan's legal guardian he regulates the contributions of its members to their legal obligations, often indeed helping out of his private means. It is a small step from this to the direct representation by fee'd counsel which we find as an established custom over wide areas in the Congo, and in Sierra Leone where (according to Dapper) pleaders wear masks to avoid recognition.[1] There can be no doubt, I think, that this very "civilized" development may be directly traced to the joint principles of status and substitution. I shall have to recur to the latter at a later stage.

Admitting, then, that African law is based in a maintenance of the equilibrium, that it is a code of positive rules rather than of negative prohibitions, one would expect in the first place that the penalty would be directed only towards a readjustment of the *status quo*, and secondly that the question of intention or motive would not be considered. I shall deal with these two points separately and as briefly as possible.

Penalty.—I have already said that the law is not penal or vindictive, and that the idea is to make the punishment fit the crime. That is why under native law a thief so often goes unpunished. If theft is committed, material equilibrium has been impaired; but if restitution is made there is no more to be done. Nevertheless thus simply stated, the position does not square with ascertained facts, and it is incumbent on me, if I am to justify my hypothesis, to explain the apparent inconsistency. In the first place we may note that among the tribes of a relatively simple constitution, more particularly the pastoral tribes, the principle which I have enunciated may generally be found to hold good. According to Hartland, with advancing civilization the extreme penalty of death and mutilation is often mitigated or compounded for. This is true, but there is an intermediate stage where the penalties are apparently out of all proportion to the trivial offences for which they are inflicted. Such processes are to be found in tribes which have strongly centralized governments and in which the checks inherent in clan independence have largely broken down and have not yet been replaced by such checks on tyranny as we find in the powerful States of West Africa, which were a direct outcome of these disproportionate punishments. Nevertheless I do not think that even so the legal principle of equilibrium breaks down, as the penalties of mutilation and so forth were not inflicted in retaliation for the offences *per se*, but because through the centralization of authority in the ruler as representative of tribal interests these offences had come to be regarded as treason, and treason (as we shall see), being an act subversive of the conditions under which alone equilibrium can be maintained, came in the category of public offences, which have always and everywhere been punished under a different procedure.[1] But even apart from these more developed societies, in which theoretical treason rather than the substantive offence is at issue, we find several instances of disproportionate penalties, which appear to invalidate the principle of equilibrium. If we take the case of theft, for instance, it is a simple matter to restore the equilibrium if the stolen property can be returned to its owner or can be replaced by an equivalent. But obviously in many cases this is impossible, and it has been necessary to impose arbitrary values, which may or may not appear to us to be at all equivalent. Thus a canoe, stolen and lost, has to be replaced by a number of goats equal to the load it could carry; a hunting dog, however old and decrepit, has to be compensated for by goats equal to the number of animals which it has brought down, a solution which may obviously be unfair. But it is not the intrinsic value, but the achievement or capacity which is taken into account. These practical modifications apart, however, we do find a great number of instances in which theft is over-heavily penalized. Among the Batetela, for instance, a thief's property is confiscated, he might be sold into slavery, and his village might be plundered: among the Baluba-Hemba and the Baganda a thief might be mutilated and enslaved; the Anyanja cut off a thief's ears and hands, and so on. But the real point is that once again it is not the actual theft that is punished. The punishment varies according to the general culture of the tribe. In communities where the people leave a great deal of their property in open huts in cultivation far from the villages theft is obviously more serious a matter than where the opportunities are not so great. The thief, therefore, is more severely punished in such cases, not in retaliation for the stolen article—we may even find that the punishment in the same community for the theft of a more valuable article from a place offering smaller opportunity to the thief is less severely punished—but because he introduces mistrust into the community and by his action invalidates those principles on which the welfare of the community depends.[1] For this reason it quite frequently happens that an habitual criminal is formally hanged, not for any specific act, but because he has proved himself to be a public enemy and thus comes under the operation of public law.[2]

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[1] It is perhaps worth noting in this context that among the Bangala each party also hires its own claquers, who applaud every point made by the one who hires them and laugh ironically at the arguments of the other side.

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[1] The concept of treason varies widely, ranging from a felonious act or attempt against a ruler as a person, which is ultimately no more than a flagrant disregard of status, to the much wider idea of an act endangering the life of the community concentrated in the exalted individual. From the latter point of view any misdemeanour might be considered treasonable, as the ruler represents both the living and the ancestors and is responsible to the latter for the behaviour of his subjects. The ruler is thus the trustee of the tribe and theoretically the lives and property of all his people are in his control. Hence in certain of the more centralized communities even the compensation paid in private suits is paid to the ruler and he may allot as much or little of it as he cares to do to the injured party. Hence too the saying that "all blood belongs to the chief," and therefore any act of homicide is an act against the authority of the chief and to that extent treasonable. Accordingly the concept varies with the nature of the governmental institutions of the community, and in the less centralized tribes may be said not to exist at all, except as an abstraction which may be applied to all acts which are subversive of the conditions under which equilibrium may be maintained.

Motive or Intention.—There is some conflict of evidence as to how far intention is taken into account. In strict theory it is obvious that, if the object of the law is to restore the *status quo*, intention cannot come into the matter. The offence has been committed and has to be adjusted. But what I have said of theft applies here too, as the circumstances may be as important as the offence. This particularly applies to acts of homicide. The Baluba, for instance, distinguish, according to Colle, between voluntary and involuntary homicide; among the Basonge drunkenness is a palliative circumstance. The same distinction is made by the Bashilange, the Chagga and others; but many tribes, such as the Awemba, do not consider accident or drunkenness as a mitigation of the offence. It may be noted, however, that whether the offence is treated as murder or manslaughter, the penalty—death in the case of the former, compensation in the case of the latter—is just as much a process of restoring the equilibrium. If a man of clan A kills a man of clan B, clan B is the weaker by one unit: the equilibrium is restored if clan A is weakened to the same extent by the loss of a member, or if it transfers a recognized equivalent in property to clan B. The most important distinction, however, is made in the murder of a guest or a host, for which there can be no possible palliation. But here again it is not so much the intention or the act of homicide which leads to the maximum penalty, but the breach of the sacred laws of hospitality on which the integrity of the community depends. I think it is true to say that motive is only regarded in so far as it affects the whole community and prevents its proper functioning, or destroys those qualities which make for corporate harmony and equilibrium. With us the motive, or the intention, is immediate and individual; with the Africans it is not so much the guilty intention, but the effects of the intention on the community at large.

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[1] There is one further reason for an apparently disproportionate compensation for theft, which is not so easy for us to understand. Everything acquires the personality of its possessor, and coincident with the act of theft the thief damages the stolen personality with results which, quite apart from the possibility of witchcraft, may be dangerous to the person involved. Partly the sacrifice which always accompanies any compensation is intended to restore the personality intact, but if this is not considered adequate additional compensation may be necessary. This interpretation is corroborated by the fact that every transfer of property requires a ceremony designed to remove the personality of the original owner. Among the Lango, for example, if A acquires a cow from B in exchange for the equivalent number of sheep, he has in addition to pay B a spear " for its tail," because B's personality has to be driven out of the animal into the tail, and thence into the spear.

[2] Though legally the clan is a single unit and, as we have seen, it is theoretically impossible for a member to commit an offence against a fellow-member which would lay him open to a private suit, it is obvious that there must be some machinery to protect the clan from an habitual offender. The principle of group responsibility makes this essential, as one who is constantly involving the clan in costly extra-clan disputes is wasting the property of the clan without contributing an equivalent to its economic prosperity. The offender in such a case, while under no liability to an individual of his group, is nevertheless making it impossible for his group to maintain its group-status or equilibrium in relation to the other groups of the community : he is jeopardizing the principles which ensure the stability of the society ; and for that reason he comes within the scope of public law, administered on this occasion, not by the tribe, but by the clan. The habitual offender is accordingly outlawed by his clan : he is publicly put out of status ; he cannot claim the protection of the clan and the clan disowns all further responsibility for his actions. This sentence may be followed by the maximum penalty of execution, which is frequently the fate of the habitual offender; but whether this is so or not, the result is much the same, as without the protection of the clan all economic activities are closed to the individual and he will either die of starvation or by assassination, his murder being of no concern to anyone, now that he has no membership in a protective group. This treatment of the habitual offender emphasizes the cardinal principle of African behaviour that the individual has communal responsibilities and obligations, only by discharging which is he entitled to any of the benefits which membership of a society confers.

Only in offences which are held to be definitely anti-social is the public law invoked, and by anti-social is meant something much more than the disturbance of this or that equilibrium. It implies an act subversive of the whole fabric of society, an act which unpunished and unchecked would ultimately destroy the body politic. Murder does not come into this category, as it is treated as a personal offence which upsets the equilibrium, it is true, but which does not touch those fundamentals which make the conservation of the equilibrium possible. This is true also of nearly all the major offences in our criminal codes, for which the sanctions lying behind primitive law are normally sufficient to secure a restoration of the equilibrium. The anti-social crimes, which come under public law, are treason, witchcraft, incest and sexual perversions (the last two being associated with witchcraft on the presumption that none but witches and wizards are capable of them). These crimes cannot be dealt with by normal methods. There is no question of equilibrium involved, as, particularly in the case of witchcraft, no individual or community is alone threatened or injured by the crime: its repercussions affect the whole body politic. The insidiousness of its operation and the illegitimate use which it makes of magic and the supernatural render the usual processes of law abortive, and the public law therefore does the only thing possible and eliminates the menace. Any of these anti-social crimes is punished by death, because that is the only measure which can preserve society.

Sanctions.—European observers have often doubted the existence of law in African societies, because generally the paraphernalia which we associate with law are absent. Without prisons and a police force it is assumed that there can be no sanctions such as would give law the requisite validity. It is at this point, I suspect, that we differ most widely. The penal sanctions are the least important of them all, chiefly because the law is positive and not negative, and because it is solely interested in maintaining the social equilibrium. I shall try to sum up the sanctions which are universally valid in Africa as briefly as possible, only remarking that in certain areas, particularly in West Africa, secret societies tend to operate as a sanction for the observance of the law. Many of them, like the Oro and the Ekemeku, are police societies which act as guardians of public morals and punish offenders. In them we find the nearest approach to our system of punitive justice.[1] But generally speaking, symbols of legal authority such as these are completely absent, and in the circumstances would be otiose.

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[1] Similarly the *Komo* society of the *Bambara* is above all a society for social protection, and is intended to punish murderers, thieves and other wrongdoers. A threat from *Komo* will frequently force thieves to make restitution, and it poisons habitual offenders who refuse to reform. The *Ngi* (gorilla) society of the Fang punishes murderers and executes the practitioners of black magic, while in matters of importance the *Ngi* can be invoked by oath to reveal the guilt or innocence of a person. The esoteric cults associated with many secret societies, and the automatic sanctions which these cults invoke, make them powerful instruments for the preservation of law and for the punishment of offenders. Such associations as these are really special tribunals of tribal justice, carrying the sanctions of tribal law, and should not be confused with the tribal associations to which I have referred and which dispense associational laws to their members only: these societies, being limited in membership, are in a sense extra-legal and should only be considered as one of the sanctions of public law. The Poro society, probably the oldest in Africa, is described as "the intrinsic constructive element of tribal life, and all the worldly and religious possessions of the tribe centre in and emanate from it." It is, in short, the sanction for all tribal institutions and is the apotheosis of their legal concepts. Westermann translates *poro* as "ancient," but Wallis tells us that the word means "law," and in this he is supported by Allridge who speaks of "the order of the Poro or Law," a definition which is at least significant of one of the major functions of Poro.

We have found that by the very nature of their constitution African societies have largely failed to develop the intertribal, or as we might say, the international, concept of law. Where intertribal co-operation is necessary for certain economic activities, such as hunting, or where there is much intertribal trade, the tribes concerned naturally respect the provisions of each other's codes, and boys in their initiation schools are taught the relevant laws of their neighbours and are admonished to observe them when occasion arises. This often leads to the adoption of neighbouring customs, which also implies the adoption of the spiritual sanctions, and consequently we find a good deal of interaction of this nature, which may (and often does) serve as an elementary code of intertribal law. But its effects are limited, and, generally speaking, our contention holds good that the law of the tribe is for the tribe only. For any real development of intertribal law we have to turn to those secret societies and associations which operate over a number of different tribes, subjecting all their members, irrespective of their tribal affiliations, to the one associational law. As Beaufaict writes in this context, "the Nebeli and Ngebo associations of the Ababua, Mangbettu, Azande and Abarambo, and possibly other tribes of the Welle, are in constant contact with each other and unite members of tribes which are otherwise inimical." It is in the intertribal character of associations such as these that we have to look for the germs of an intertribal code.

Religious Sanctions.—Primarily the law is obeyed, just because it is accepted. Its acceptance and its position as an integral part of the social organization are its own sanction. It is obeyed, because only by obedience to the law will society function, and it is in everybody's interest to subscribe to its regulations. Law is not the act of a sovereign, it is not enforced by *ad hoc* sanctions, but by a sanction involved (as Hartland remarks) in the belief and practice of the community. But obviously no community is entirely composed of right-minded people, and other sanctions are required, both for control and for enforcement. So behind everything lies the religious sanction, which depends for its validity on the theory that the clan is a continuous entity comprising both the living and the dead. The ancestors are just as much concerned as the living in the due observance of the law. The law has the moral support, not only of the living tribe, but of all the tribesmen who have ever lived and died. This terrific antiquity, remote but ever present, is in itself a very potent force in securing due regard for the law. But it does more: it introduces a religious sanction, which is perhaps the most potent factor of all. No compensation for an offence, no reparation, is complete without sacrifice. Every offence has to be legally compensated and ceremonially purged, and till both are done the offender and his community are in danger of spiritual retribution. It is this religious nexus which gives African law an authority sufficient to dispense with the mechanics of enforcement.[1]

Collective Responsibility.—Again the principle of substitution, to which I have already referred, comes in to re-enforce group responsibility. If everyone of the same status is liable to be called upon to act as a substitute when an offence has been committed by a member of the group, it is everybody's business to see that the laws are obeyed; and if an offence has been committed, the group is equally liable to spiritual retribution and sees that the requisite penalty is forthcoming. Collective responsibility is therefore a potent factor in the prevention of crime and in the liquidation of the offence without extraneous pressure.[2] On the other hand, the principle of equilibrium has its limitation, since, depending as it does on a balancing of group interests, there can be no reparation for an offence committed by a member of the clan within the clan. There obviously can be no theft within the clan, as all property is, in theory at any rate, communally held by the clan. But even if a man murders one of his own clan, he has committed no offence which is subject to the tribal law, since any compensation payable would be from the clan to the clan, involving no change in the tribal equilibrium. Clan law, however, has a potent weapon in the punishment of outlawry, which means virtual death, as the offender, if outlawed, can no longer look to the clan for protection. It does not hesitate to use this weapon or even to execute an habitual criminal if it finds that his recurring misdeeds are too great a strain on the resources of the clan.[1]

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[1] This is also the reason why under native law there is no Statute of Limitations. An African inherits, not only the custody of certain property, together with a certain status in the community, but also all the accumulated responsibilities of his ancestors. A debt or a feud is never extinguished till the equilibrium has been restored, even if several generations elapse. It is probably not an exaggeration to say that to the African there is nothing so incomprehensible or unjust in our system of law as the Statute of Limitations, and they always resent a refusal on our part to arbitrate in a suit on the grounds that it is too old.

[2] It has been suggested to me that a striking analogy is to be found in our old institution of frank-pledge, which is defined as "a system by which all free men of a tithing were responsible for the general good behaviour of its members." It is possible that a comparison by a competent historian between mediæval English institutions and the present-day institutions of Africa might lead to fruitful results and might suggest possible directions in which adjustment and assimilation are practicable.

Emphasis is often laid on the principle of collective responsibility by a curiously indirect method of instituting suits. Among the Bankutu, for instance, an injured person obtains redress by killing a slave whose owner has no claim on the murderer, but on the man whose injustice has caused the murder. We find, too, that a Fang who has been wronged does not go to the offender for settlement, but goes to another town and shoots the first goat he sees, or if he is very angry, a woman. The original offender is now responsible and liable to two parties. This may seem a curious procedure to us and I do not suppose that it is one which would ever be incorporated in our codes, but its effect is to make an individual very chary of committing an offence, as a trivial beginning might have an exceedingly uncomfortable end, and the possible repercussions of his offence suffice to act as a sufficient deterrent.

Magical Sanctions.—Analogous to the religious sanctions are various magical sanctions which carry an automatic penalty in the case of certain offences.[2] Theft may also be publicly proclaimed and the thief cursed with bell, book and candle, a procedure which is generally effective in securing speedy restitution. Even the threat of witchcraft—generally anti-social, but used socially as a legal sanction—may be invoked to secure reparation from a recalcitrant offender. We may note, too, that the same sanctions are sometimes applied in the administration of justice; for it is not unusual for witnesses to be heard on oath in any serious case. Chagga witnesses are solemnly cursed by the chief, while among the Ashanti should a witness die soon after the trial he is held to have been guilty of perjury, and the judgment may be reversed in consequence.[1]

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[1] Nevertheless the inflicting of these drastic penalties by the clan on a clansman is generally considered to be repugnant to clan sentiment, and efforts are often made to avoid the uncomfortable feeling of disloyalty, which the breach in clan unity involves, by recourse to a legal fiction. Thus we frequently find that the executioner must be a member of one of the helot or pariah tribes, and theoretically the execution by an alien is morally justified as an act of war. Thus the Ovambo executioners are generally six Bushmen or, if they are not available, natives of some other tribe. But the Chagga have satisfied their consciences by making the execution appear to be an accident. When the clan decides to execute one of its members, the chief organizes a sham fight, during the course of which the culprit is "accidentally" shot, a pretence which is kept up from beginning to end.

[2] Thus breaches of tabu or neglect of a religious ceremonial often carry automatic sanctions, which recoil on the health and prosperity of the offender and his group. The ordeal, which is generally regarded as a legal sanction, is rather an appeal to an automatic sanction. If the evidence is insufficient or if either of the parties prefers to appeal to a spiritual tribunal, the ordeal is brought into operation and its decision is accepted as final. It only differs from an automatic sanction in so far as it does not carry its own punishment, but gives a verdict which leads to an automatic adjustment of the equilibrium. The difficulty, however, with automatic sanctions is that they do not always recoil on the right person, and this may create an indirect

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situation in law analogous to other indirect procedures which have just been considered. Among the Didinga, for example, if a man has been wounded in a fight—however superficial the wound may be is immaterial, so long as there has been any effusion of blood—he may not enter a village without first undergoing ceremonial lustration. If by negligence he does so, he must sacrifice a sheep at once in an endeavour to avert the penalty which his unlawful act may involve; but even with this sacrifice he may be too late, as the sanction comes automatically into force, though its operation may be long delayed. A case in point may make this clearer, as here we have an inevitable conflict between our legal concepts and theirs, and one for which any solution, other than education, seems to be impossible. For every calamity there is an immediate and a remoter cause. In a certain village a child of three died of measles during an epidemic. The Didinga diagnosed the complaint accurately and treated it to the best of their ability, and realized that the child died of measles which was accepted as the immediate cause of death. But after her death, the child's family instituted a suit against a member of the village, because ten years earlier—seven years, that is, before the birth of the child—he had entered the village with blood on his shoulder and without having made formal lustration. That, it was held, was the remoter cause of the child's death, as had he not been careless in his observance of the tabu the child would not have fallen under the automatic sanction which his offence invoked. The culprit made no hesitation in admitting the facts, acknowledged his responsibility and paid over the requisite twelve head of cattle without a protest. Situations such as these make it difficult to find an adjustment between our two codes, but the case serves to emphasize once more the breadth of communal responsibility which makes for good conduct. An individual is doubly careful to observe the law if a breach of it may involve him and his clan in repercussions which he could not possibly envisage at the time; and alternatively his group is a sedulous custodian of an individual's behaviour if his misconduct may jeopardize its future prosperity.

[1] The expedients by which witnesses are put on oath vary considerably. They may even be subjected to the ordeal together with the parties to a suit, but more commonly they are sworn, if an oath is administered, on some sacred symbol, such as a spear, the presumption being that the supernatural sanction invoked would automatically punish any perjury. Such local forms of oaths have sometimes been adopted in English courts, but generally without effect, because it has been assumed that any spear would do, whereas not only is a specially sanctified spear kept for the purpose, but the oath has also to be prescribed by a particular individual accompanied by a precise formula. In the absence of these the oath is naturally valueless. Equally valueless is the application of an oath current in one tribe to witnesses of another, an error into which our courts have sometimes also fallen. But as a matter of fact, in their own courts and under their own laws, witnesses are generally fairly reliable, as the matter on which their evidence is required is usually one of common knowledge. A conflict of evidence is a genuine difference of knowledge or interpretation. It is no good for a witness to lie in his own community, as

Ridicule and Ostracism.—Ridicule and ostracism as a legal sanction is an idea now foreign to us, but among the minor sanctions with which I have no space to deal it plays a very important part in Africa, and its success suggests that under our dispensation the stocks might be a more efficient deterrent than the prison. Ridicule formally and legally applied is, I imagine, as effective a sanction as it appears to be, because (as we have seen) status is of peculiar importance in African society, and the effect of both ridicule and ostracism is to put the victim out of status and so no longer in a position to participate in communal activities, till his offence has been purged and his status restored. That, incidentally, is why defamation is always one of the most serious of private offences, requiring a heavy compensation; because the effect of defamation is to cut at the very root of group co-operation and to deprive the defamed man of his proper status in the community.

Administration of Justice.—This feature of equilibrium which the law is there to conserve has its consequences on the administration of justice. It is not the duty of the chief, generally speaking, to seek out crime in order to punish it, and that is one of the reasons no doubt why on first contact with our civilization the chief appears to fail in one of the, to us, chief duties of a ruler: he is not used to the idea that he should stand outside his society and act as a policeman. But on the other hand, it is the duty of every member of the community, owing to the fact that he is one of a collective responsibility, to report any breach of the public law, of which the chief should thereupon take cognizance. As it may take some time for the processes of law to be put into action, there is an obvious danger that the culprit may suffer summary justice at the hands of the injured party; but provision is made for this by the establishment of sanctuaries, where an accused man may await in security the slow movements of the law. This indeed is probably the chief social function of sanctuary in African societies. The institution of private suits is not necessarily a simple matter and, as we have seen in some communities, recourse has to be made to indirect methods. The central authority may only be concerned with certain specified cases, the public causes, and it may be necessary for the aggrieved party in a private suit to commit one of these major crimes, in order that in the subsequent public inquiry into his conduct his private complaint may be indirectly investigated. Never-

life is so public that he would certainly be detected. On the other hand, perjury is often found to be very useful with us, because we do not know the circumstances as the witness's own tribesmen know them. Lying is also a kind of defence mechanism which the African employs when he is embarrassed by our odd procedure and by formalities so different from his own. He generally lies because he does not understand and therefore thinks it safer to lie. Similar considerations make him more reluctant to pay the penalties imposed by our laws, than by his own. He does not understand the sanctions on which our laws are based, and even if the verdict is admittedly just the reason for the verdict is often, to the African, unsound. In his own courts he is not accustomed to having a reason given, as the judgment is obvious to all parties. Forensic reasons embarrass him and leave him disinclined to accept them or the consequences of the judgment.

theless we also find safeguards for the impartial administration of justice. Where an appeal is made to the king, among the Ashanti for instance, from the divisional chief, if it succeeds the punishment falls on the judge who pronounced the sentence, whereas if it fails the appellant is usually killed—a measure which not only ensures impartial justice, but prevents frivolous appeals.[1]

In his administration of the public law the chief, or whatever the legal authority may be, sits as a judge and awards the appropriate sentence; but it would be more correct to call the inquiry into a private suit an arbitration rather than a trial, and very often no judgment is pronounced, the general opinion of the court being obvious to everyone. One authority, writing of the Akamba, makes a similar distinction, when he says that " we speak of ' trial ' before a *kiama* (legal council), the natives speak of a consultation: the use of the word is significant," he adds, as it is clearly " not the business of the elders to enforce their decisions." Everyone knows the law and the law is universally accepted. Only questions of fact are in dispute, and once these have been established by arbitration their legal sanctions are normally sufficient to secure compliance.

Character of the African Laws.—One word on the character of the African laws. There is nothing rigid or unchanging in them, though the changes may appear to proceed at a very slow rate. In a great number of tribes there is an annual promulgation of the major laws, together with an announcement of new legislation, though some tribes—notably the Rotse—are said to resent such changes, which may cause them to be estranged from their ruler. But Bowdich tells us that the new laws are not nearly so powerful as the old traditional ones, and the reason must be that they have not the religious sanction behind them. This sanction would take about two generations to acquire, and we can thus estimate approximately the rate of time which must elapse before even their own legislation has any validity. But Africans are ingenious people and have devised another and easier way of getting out of an impasse. If any custom or law begins to feel oppressive, they do not care to abrogate it at once on account of its religious sanction. But being masters of legal fiction, they devise a ceremony which in any particular case will absolve them from the operation of the old law. I may cite as an example a Thonga ceremony which breaks down the blood-tie and thus authorizes a form of marriage legally incestuous. In course of time the ceremony becomes the important thing and takes the place of the obsolete law.

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[1] Weeks records a singular provision by which the impartiality and immunity of the judge are indirectly secured. Among the Bangala a chief is appointed in every district by the towns of the district to act as chief judge in all important matters. At the time of his appointment the heads of all the families in the district, who desire to come under his jurisdiction, cut down his banana trees. This gives him a *casus belli* against the towns that acknowledge him as judge, since he is the party offended by their act. The custom is that the people of the offending town must not go to fight the offended town, but must wait for the latter to attack; and no subsequent quarrel can be taken up till the first is settled. Hence the chief appointed as judge may enrage a town by his decision and might call on the other towns to enforce his verdict; yet the town that finds his decision unpalatable may not attack the judge's town because of the old-standing and unsettled case of the banana trees. This ensures to the judge immunity from quarrels with the people who do not like his decisions, and thus guarantees justice and impartiality in his verdicts.

Conclusion.—I hope that I have succeeded in making clear some of the underlying principles of African law, as I see them. The conflict with our own ideas is fairly obvious : on the one side a system which is a living, sentient organism, part of the general cultural complex, based on a collectivist society, depending on sanctions of its own which are not penal ; on the other a penal code, which is not intrinsically one with the rest of our culture but can be arbitrarily imposed, and which is naturally individualistic in character. I do not venture to make any suggestions as to how the conflict may best be resolved, but I do think that a greater understanding of the principles of African law and society may conduce to an administration of justice which will prove more understandable to the African. Some approximation between the two positions seems to be called for when what we call murder, for example, may to the African be a pious duty, for which under our code he might suffer the death penalty. Under the rigid administration of our codes, if the intention to murder is present, whatever the complicated spiritual and social impulses which formed that intention, no sentence other than death is possible. The fact that in most of our courts a recommendation for clemency accompanies the sentence clearly indicates that our judges recognize that the African may not be an independent agent and that his final intention may have been the least important motive in the commission of the offence. It would be more satisfactory, however, if the difference between African and European motive were recognized in the code itself, rather than by a species of legal fiction, either by a broadening of the definition of homicide or by the inclusion of punishments less than death. The African cannot understand a procedure which having sentenced him to be hanged does not carry the sentence into effect. A wider option of punishment would be more intelligible to him than a sentence followed by remission.

It is not within the scope of this paper to examine specific instances of disharmony, as I have been more concerned with trying to elucidate general principles. Detailed research is still required on African legal systems before generalizations may be safely made. Were it not so, reference might be made to the legal difficulties involved in the African concept of incest, which is so wide as often to be unrecognizable under our law. Nevertheless to disregard it entirely might lead to a moral revolution which would result in a speedy degeneration. Such specific instances apart, however, it might be well worth considering whether our codes could not be reframed so as to take into more consideration the principles of equilibrium, rather than of punishment, and of communal responsibility together with the sanctions that this implies. This does not necessitate the surrender of any prerogative of justice on our part, but it would mean that the African, if aware that the alien law was operating under principles which he understands, would be more ready to conform to the law than he now appears to be. This is not to say that African principles are better: moral evaluations do not come into the question. But a recognition of what the law means to them and an acknowledgment of it in our codes should do much to make conformance easier and should relieve the strain on our prisons and eliminate many of the more unfortunate effects of prison life.

It is difficult to estimate how far the change towards an individualistic economy has gone in the last few years. In this respect tribal reaction has been very varied. But even in the most advanced communities the process is still at its earliest stage and we cannot expect a legal system, based on an individualistic theory, to be readily assimilated. There is bound to be conflict and an impression of injustice, however justly and impartially our laws are administered, because they are our laws, not theirs, and do not necessarily fit in with their very different cultures. If indirect rule on the one hand makes things easier by utilizing native institutions, on the other hand it is also somewhat paradoxical in enforcing an alien system of law entirely divorced from these institutions; but it should not be beyond our intelligence, once we know where the conflict lies, to devise some accommodation between the two. The natural willingness of the African to change, the fact that their laws and customs are not static, is a hopeful augury for the future, if only during this period of transition their underlying principles, and particularly some of their sanctions, could be adapted to the exigencies of modern conditions.

APPENDIX.

The distinctions, however, are in point of fact not unimportant, and the various spheres of law may be briefly tabulated:

Mainly social and economic.	*Family Law* (Sanction, religious). Marriage and incest, legitimacy, adoption, property, succession, inheritance, tabus, ritual observances (*e.g.* respect for parents: etiquette, in contrast with deference to relatives-in-law).
	Clan Law (Sanction, mainly religious). Marriage, incest and puberty, adultery, dissolution, legitimacy and adoption, property and inheritance, succession, tabus, ritual observances.
Mainly constitutional and co-ordinating.	*Tribal Law* (Sanctions, religious and disciplinary). Marriage (endogamy), offences against the person, offences against property, defamation (before this governed by rules of etiquette), succession, property (ruler as trustee), interclan relations (in-laws, etc.), treason, extra-tribal relations, economic and political, tabus, ritual observances.
Economic, social and constitutional.	*Associational Law* (Sanction, disciplinary). Marriage and incest, property, economic and social co-operation, tabus, ritual observances.

A synopsis of this sort cannot show how the different aspects of law deal with similar situations and it has only been possible to indicate their relevance by repetition. It will suffice to give one example, and possibly the best illustration is to be found in the divergent attitude towards marriage. Here we find a definite conflict between family and clan law. The former has changed, possibly under the influence of clan law. Many of the simplest peoples—nomad hunters and collectors—are endogamous: the family is the largest social group known to them, and the concept of a clan law, and still less of a tribal law, has not yet developed. We might instance the Bushmen, and brother-sister marriage of Lake Tana and other nomads in Abyssinia, which is doubtless due to isolation and environment. At a later stage, with growing contacts, came the incest prohibition, which is probably not due to any natural repulsion from consanguineous relationships, but is an artificial product arising out of group sentiment and education on the one hand and of propinquity on the other.

Clan law (1) enforced exogamy, and (2) often enjoined certain unions, such as cousin marriage, which must be regarded as the persistence of family law, which in other aspects has submitted to clan law. This persistence of an almost obsolete family law may also be seen in brother-sister royal marriages, which are not infrequent in Africa, and possibly in certain observances peculiar to specific clans, such as the Jo Anyeke among the Lango, who have a regulation enjoining a temporary brother-sister union preparatory to the exogamous marriage which is compulsory under clan law. These specific laws enjoining certain compulsory or favoured types of marriage, it should be remarked, are related to the inheritance of property and succession.

Tribal law enjoins endogamy, with the exception of frontier families, an exception which is of importance for intertribal relations, as owing to the peculiar bonds which unite relatives-in-law these families provide official channels of intertribal communication, available both during peace and war. Puberty rites come definitely within the sphere of clan and tribal law, as they aggregate the individual to wider groupings. There is no apparent necessity for them under family law.

Puberty rites also introduce the individual to certain associations founded on them, and these again modify family and clan law, *e.g.* secret societies and age-grades, which regulate the sexual lives of their members, enjoining groups of opposite sexes with whom they may or may not have relations. Nevertheless though these associational laws, which are tribal in character—even if they operate under entirely different sanctions—and help to weld the clans into a tribe, introduce new marital and extra-marital classifications, injunctions and prohibitions, and to that extent circumscribe clan and family law, yet we may observe that they still regard the earlier codes as implicitly operative. Though, for example, a Masai may have legal access to the wives of his age-mates (if he is entitled to the right by status—that is, if he is himself married), yet he is debarred from exercising this right if the woman comes within the prohibited degree of consanguinity. On the other hand, thanks to the new grouping introduced by age-grades, the clan system among the Masai and others who follow the more recent institution is definitely breaking down, and clan law as a result plays a relatively minor part in the regulation of marriage.

THE UNIFICATION OF THE LAW OF THE SEA.

[*Contributed by* H. C. GUTTERIDGE, ESQ., K.C., LL.D.]

THE law of the sea, at one time the same throughout the world, is slowly regaining its international character. The process of unification is being delayed, not so much owing to inherent difficulties, but because the congestion of business in the legislatures of the great maritime nations is acting as a drag on the wheel. The rules of maritime law are not of a nature to appeal to "the man on the Clapham omnibus" and his continental counterpart, and it is perhaps only to be expected that the relevant unifying legislation should be pushed into the background in order to make room for other measures which are more attractive to the electorate. The situation at present is that international agreement has been reached on many points, but that the authorities in many of the countries concerned appear to be disinclined to take the necessary steps to transmute such agreement into legislative form. Up to the moment of writing the following matters have been dealt with in a series of international conventions, some of which were signed many years ago: (*a*) The Law of Collisions at Sea and Salvage.[1] (*b*) Negligence Clauses in Bills of Lading;[2] (*c*) Maritime Liens and Mortgages;[3] (*d*) the Limitation of the Liability of Shipowners in Collision Actions;[4] (*e*) the Immunity of State Ships,[5] and (*f*) the Safety of Ships at Sea.[6]

This is a somewhat imposing list, but the concrete legislation to which it has given birth is of a somewhat meagre and disappointing character. A certain degree of international unification has, however, been reached in other directions, *e.g.* with regard to freeboard regulations for tankers and timber ships,[7] Maritime Signals[8] and the Maintenance of Lighthouses in the Red Sea.[9] Certain other topics are still under discussion, *i.e.* the Compulsory Insurance of Passengers,[10] Jurisdiction and Penal Sanctions on the High Seas[11] and the Arrest of Ships.[12] In one instance, *i.e.* General Average, a high degree of internationalization has been attained by voluntary action through the York-Antwerp Rules as amended at Stockholm in 1924.

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[1] Brussels Convention of September 23, 1910. [2] *Ibid.*, April 25, 1924.
[3] *Ibid.*, April 10, 1926. [4] *Ibid.*, April 25, 1924. [5] *Ibid.*, April 10, 1926.
[6] Convention of London of May 21, 1929. [7] *Ibid.*, July 5, 1930.
[8] Agreement of Lisbon, *see Revue de Droit Maritime*, vol. xxvi, p. 641.
[9] *See Revue de Droit Maritime*, vol. xxvi, p. 644.
[10] *International Maritime Committee's Bulletins* No. 86 (1928) and No. 87 (1930).
[11] *Revue de Droit Maritime*, vol. xxviii, p. 514. [12] *Ibid.*, vol. xxviii, p. 514.

To anyone who has followed the course of international negotiations on maritime affairs it must be abundantly clear that the other nations have been looking to Great Britain to give them a lead in the matter of the appropriate legislation. It is this feature of the situation which lends peculiar interest to the legislative record of this country. But it must be confessed that it is difficult to approach this question without mixed feelings. In a sense Great Britain has led the way, the Carriage of Goods by Sea Act, 1924, being a case in point. The delay in giving effect to the Safety at Sea Convention is excusable, as it has been due very largely to the war and its after-consequences. But the failure of Parliament to give operative effect to the other Conventions is more difficult to defend. As long ago as 1913 a promise was given to British shipowners that if they would consent to the abolition of the defence of compulsory pilotage steps would be taken to secure the unification of the law relating to the limitation of liability. That promise is still unfulfilled.

So far as British legislation is concerned there are three measures which may be described as milestones along the road to unification, namely, the Maritime Conventions Act, 1911, the Carriage of Goods by Sea Act, 1924, and the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. To these we may, perhaps, add the Merchant Shipping (International Labour Conventions) Act, 1925, though not strictly of a maritime character.

The first-named of these measures carries into effect the Brussels Convention of 1910, whilst the second gives legislative form to the Hague Rules of 1921 as altered and adopted by the Brussels Convention of 1924. The third statute, which is to some extent the re-enactment of an earlier measure,[1] brings the Convention of London, 1929, into force. The Merchant Shipping Act of 1925 owes its origin to the Convention of Genoa, 1920, which dealt with certain questions affecting the employment of seamen and possesses a special interest for us because it has given rise to questions of interpretation which bring into relief an important aspect of the difficulties which lie in the path of international legislative action.[2]

Great Britain has not, up to the present, dealt with the Conventions relating to maritime liens and mortgages, or the limitation of the shipowner's liability in collision actions, or with the immunity of state ships. But it is believed that the appropriate measures have been drafted or are in course of preparation, and that when a suitable opportunity presents itself the appropriate Bills will be submitted to Parliament.[3] That there is urgent need for such legislation cannot be doubted. The confusion which is created by conflicting rules of law as to the priority of mortgages and liens is clearly illustrated by the case of *The Colorado*,[1] in which considerable doubt was felt by the court as to the effect of expert evidence as to the foreign law. The scandals arising out of the doctrine of the immunity of state ships were brought into sharp relief by the case of *The Porto Alexandre*.[2] The object of the Convention as to the limitation of liability is to do away with the conflict between the English and the continental rules on this question. On the Continent the shipowner can escape liability in a collision action by surrendering his ship. In England he can limit his liability to the amount of £8 per ton of the ship's tonnage. The Convention abolishes this distinction by doing away with the continental "*abandon en nature*" in cases of liability for death or personal injury, and by giving the shipowner the option in other cases of paying the value of the ship or of paying £8 per ton of the ship's tonnage. The value of the ship in case of abandonment is to be the value of the ship after the accident.[3] The urgent need for the legislative enactment of these Conventions has been insisted on frequently by the Comité International Maritime, which at the Conference of Oslo on August 23, 1933, instructed its executive committee to press strongly for legislation by such countries as were still in default.[4]

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[1] The Merchant Shipping (Convention) Act, 1914, which never became effective owing to the Great War. Its operation was postponed from time to time by Order in Council until its repeal by the Merchant Shipping Act of 1932.

[2] *Ellerman Lines* v. *Murray*, [1931] A.C. 126; *Barras* v. *Aberdeen Steam Trawling Co.*, [1933] A.C. 402.

[3] *See* the *Report of the British Section, Antwerp Conference of the Comité Maritime International*, 1930.

It is sometimes said that international action receives its greatest support from the smaller nations. This view is certainly borne out by the fact that Belgium and the Scandinavian[5] countries have shown the greatest readiness to give effect to the Brussels Conventions. But with the exception of Great Britain and Italy the larger maritime countries are lagging behind.

It is now nearly ten years since the Brussels Convention of 1924 relating to negligence clauses in bills of lading was signed. No action has been taken up to the present to give effect to this Convention by the United States, France or Germany. This may be due to a variety of causes. These countries have perhaps been waiting to ascertain the operation in practice of the British Carriage of Goods by Sea Act, 1924, which in one form or another is in force throughout the British Empire with the notable exceptions of Canada, New Zealand and South Africa. The delay may be due to some extent to the confusion caused by the economic blizzard of the last few years; but it is serious. It would appear, however, that legislation is in progress in most, if not all, of these countries, and there are grounds for the belief that many of them will give effect to this Convention at an early date. Belgium has already done all that is necessary.[1] The Netherlands government has legislated, but has not given full effect to the Convention. The Italians and the Scandinavians are ready to legislate, but are awaiting action by the other nations.[2] The result up to the present has been somewhat discouraging, but it would seem that brighter prospects are now in view.[3]

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[1] [1923] P. 102.

[2] [1920] P. 30.

[3] *See* Haralambidis, *Le Système de la responsabilité personelle limitée en valeur des propriétaires de navires de mer et la Convention internationale de Bruxelles* 1924. *Revue de Droit Maritime*, vol. xxiv, p. 1.

[4] *Revue de Droit Maritime*, vol. xxviii, p. 514.

[5] For legislation in Scandinavia, *see Report of the Antwerp Conference of the Comité International Maritime*, 1930. *La Conférence d'Oslo* 1933 by Gustave Siesse, *Revue de Droit Maritime*, vol. xxix, p. 15.

Matters have proceeded somewhat more rapidly in the case of the Safety Conventions. We have in this case a German law of April 10, 1931; a French law of June 16, 1933, and an Italian *décret-loi* of December 22, 1932. In the case of maritime mortgages and liens and of the immunity of state ships we find legislation in Belgium (law of November 20, 1928) but little or no progress elsewhere. The situation as it exists at present cannot be described as satisfactory, but there do not seem to be grounds for despondency, though the failure of some of the maritime countries to implement their obligations under the Brussels Conventions of 1924 is frequently adduced as a strong argument by the opponents of unified law. It must be remembered that difficult as it is to unify rules relating to navigation proper, it is infinitely more difficult to do so when the questions at issue are closely connected with the Law of Obligations as in the case of a shipowner's right to contract out of liability for negligence. This no doubt furnishes the explanation of the fact that such unification as has taken place is largely within the limits of maritime law as defined in its most rigid form. The London Convention of 1929 on safety at sea has, for instance, found much readier acceptance than some of the earlier Conventions.[4]

As regards the matters which have not yet reached the stage of convention making, the position is briefly as follows. A scheme has been proposed for the compulsory insurance of emigrants, but has encountered very strong opposition, with the result that the matter still remains in abeyance. The question of penal jurisdiction in collision cases, which came into prominence owing to the action taken by the Turkish authorities in the *Lotus Case*, is still under discussion. The preparation of draft rules has been entrusted to a sub-committee of the Comité Maritime International, but considerable differences of opinion have manifested themselves. The latest draft confers criminal jurisdiction in these cases on the courts of the flag of the ship or the national court of the master or other person responsible for the collision. Whether a pilot is to be regarded as a person in the service of the ship is left open. Parallel jurisdiction is also to be conferred on the territorial courts in the case of a collision taking place in territorial waters. Art. 4 of the draft provides that the offending ship shall not be arrested or detained for more than eight days for the purpose of making investigations. The period of prescription of criminal proceedings is two years from the date of the collision. Art. 7 of the draft is interesting because it provides that in the event of a positive or negative conflict of jurisdiction this question may be referred for decision to the Permanent Court of International Justice which shall "settle the conflict with due regard to the terms and the spirit of the Convention, and also to the general principles of international law." Vessels of war and government-owned vessels appropriated exclusively to the public service are excluded from the operation of the draft convention.[1]

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[1] Law of November 28, 1928.

[2] *Report of the Antwerp Conference of the Comité Maritime International*, 1930. Siesse, *loc. cit.*

[3] *Report of the Oslo Conference of the Comité Maritime International*, 1933.

[4] *See Revue de Droit Maritime*, vol. xxviii, p. 446, for the French law of June 16, 1933, and *ibid.* p. 483, for the Italian Décret-Loi of December 22, 1933.

As regards civil jurisdiction in collision cases the draft which has been prepared by the sub-committee of the same body is based on the "permissive" principle. Proceedings can be commenced by the plaintiff at his option either (*a*) before the court of the commercial residence or in default the private residence of the owner of the defendant ship, or (*b*) before the court of the place where the defendant ship or another ship of the same owner has been arrested, or (*c*) in the case of a collision in territorial waters before the court of the place of collision. It will be noted that jurisdiction is not given to the court of the port of registry, and that nothing is said about jurisdiction by consent. One suggestion which was laid before the drafting sub-committee is that a special international court should be established for the trial of collision cases. It may be added that the draft does not apply to actions arising out of the contract of carriage. This is in order to avoid possible conflicts of jurisdiction arising out of the provisions of national laws relating to the Brussels Convention of 1924 on bills of lading.[2]

The formulation of international rules regulating the arrest of ships is proving to be a matter of very great difficulty owing to the wide differences which exist between the laws of the various maritime countries. The draft prepared by the sub-committee of the Comité Maritime International is framed along the following lines. The right of arrest is granted to all creditors whether the claim relates or not to the ship. The arrest can only be made with the authority of a judge, who is to have a discretionary power to require the arresting creditor to furnish a guarantee of his *bona fides.* Arrest is not to prejudice the right of the shipowner to dispose of his ship or to mortgage it, though any such transaction can be impeached if it constitutes a fraud on creditors.

The owner of the arrested ship may furnish bail without prejudice to any existing right to limit his liability. One question which, in particular, has given rise to difficulty is that of the liability of the arresting party in the event of the arrest proving to be unlawful. A compromise is suggested, *i.e.* that in the case of an arrest made *mala fide* the arresting party shall be liable in full for the consequences to all interested parties, but that where there is no bad faith his liability is not to exceed any expense to which the shipowner may have been put in order to secure the release of his ship. Questions of procedure connected with arrest are to be governed by the national law of the court.[1]

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[1] *Report of the Oslo Conference of the Comité Maritime International*, 1933.
[2] *Ibid.*

In conclusion it will be observed that although the difficulties to be surmounted are often of a serious character, and although there has been regrettable delay in giving effect to international conventions, the situation is not one which must necessarily be regarded in a pessimistic spirit. Unification, if it is to be successful, must always be a very slow process. The ground must be dug over and over again if the harvest is to be of any permanent value. It has taken rather more than half a century to secure unanimity amongst the continental countries on the subject of the law of negotiable instruments, which only ranks second to maritime law in its international importance. There is, however, the danger that unnecessary delay may play into the hands of the dogmatic anti-unificationists, who are to be found lurking in the background in many countries. The activities of such persons may not be vocal, but they are none the less to be reckoned with. The best method, in the case of maritime law, of countering any manœuvres of this kind will be to ensure the prompt recognition of the international obligations which this country has undertaken in the form of the Conventions to which reference has been made.

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[1] *Report of the Oslo Conference of the Comité Maritime International*, 1933.

THE SOVIET MARITIME CODE, 1929.

[*Contributed by* S. Dobrin, Esq.].

As a piece of legislation, the Soviet Maritime Code is in no way original. In vain would one apply to the Code for instruction as to the special problems which arise for a Socialist State in capitalist surroundings in the sphere of maritime trade and as to how the Soviet legislator endeavours to solve them. Such problems there undoubtedly exist. A great many devices of " bourgeois " maritime law are instruments of credit. The control exercised over the goods through the bill of lading makes it possible for a seller to ship the goods without previously obtaining the purchase price ; which practically means that the buyer is spared the necessity of procuring the purchase price for the whole period while the goods are at sea. The lien of the owner on the cargo for his freight makes possible the transport of goods without previous payment of freight. Some other liens known to the maritime law serve the same purpose of credit. The Soviet State is not above the necessity of credit, but many " bourgeois " devices are clearly inapplicable in socialist conditions. Foreign trade, indeed every trade, is a State monopoly in the U.S.S.R. Goods may be imported into that country only under special licences which are issued to particular State organizations for particular purposes. All the possible buyers of imported goods are State organizations, and, as a rule, there is under the Soviet system only one possible buyer for any particular kind of goods. In such circumstances Soviet law can guarantee to the seller who holds the bill of lading that the goods will not be handed over to the buyer without his consent, but it cannot give him the right of selling the goods in the U.S.S.R. to anyone else. The control over the goods through the bill of lading becomes rather negative ; the seller, by holding the bill of lading in his hands, may prevent the handing over of the goods to the buyer, but he has no right and no possibility of selling the goods in the U.S.S.R. to any other buyer. The owner's lien over the goods for his freight must also become chiefly negative in its effect in a socialist country. The owner may prevent the handing over of the goods to the consignee, but he is bound to meet the greatest difficulties if he tries to consummate his lien by the sale of the goods. The only Soviet ships worth talking about are ships belonging to the State or to State organizations, and they are all exempted from arrest and execution. How can there be a maritime lien on a Soviet ship in Soviet law, and what can be the value of such a lien ? But, as stated, the Soviet State is not above the necessity of credit, and the question naturally arises whether some socialist substitutes cannot be found for the " bourgeois " devices which are inapplicable in socialist conditions. Probably, the answer must be in the negative. One cannot eat one's cake and have it. A State cannot abolish private trade in its territories and enjoy the advantages of a developed commercial system ; she cannot declare her ships *res extra commercium* and utilize them for purposes of credit. The problem is, however, worthy of a closer study. No traces of any such study can be found in the Soviet Maritime Code. It seems that the Code does not even realize that such a problem exists and requires consideration. The Code remains faithful to " bourgeois " wisdom and reiterates " bourgeois " maxims as if " bourgeois " economy had not been expelled from the U.S.S.R. Under s. 113, subs. 2, the carrier may sell the goods by auction to recover his freight, if it remains unpaid to him during two months from the date of discharge. A whole chapter, c. 10, deals with privileged claims ; *i.e.*, as the Code itself explains (s. 182), claims which are preferentially entitled to satisfaction out of the value of the ship.

Sources of the Code.—A mere glance at the Code is sufficient to discover that chapter Y, part A, on contracts of carriage of goods by sea, is a blend of rules taken from various foreign sources (chiefly the German Commercial Code) plus the Hague Rules, 1924 ; the chapters as to collisions, salvage, limitation of shipowners' liability and privileged claims reproduce the respective Brussels conventions. The reproduction is, however, not a literal one. The foreign material is somewhat rearranged and in a great many cases substantially altered. It is not easy to discover the principle, or principles, by which the framers of the Code were guided in that work of rearrangement and alteration. Although the Code is not a socialist Code, it is a Code of a socialist country, and naturally gives special heed to the interests of " toilers." For instance, the Code reproduces the provisions of the Brussels convention limiting the liability of the shipowner for damage caused to third parties by the acts of any person in the service of the vessel, but makes an exception in favour of " toilers " : the liability for death or injuries to " toilers " is unlimited. Such alterations in favour of " toilers " are, however, few in number, since the Code has very little to do with " toilers " in its principal parts.

Cargo-interests.—Of much greater importance are the innovations of the Code in favour of the cargo-interests. These again are only natural in a Code of a Russia gone socialist. For years it became almost a tradition that a progressive legislator must take the cargo-interests under his special protection. Russia, even socialist Russia, is still, and will continue to be for a considerable time, a typical cargo-owning, and not ship-owning, country. The Code extends the principles of the Hague Rules to charters. It extends them to inward voyages, provided the case is tried in a Soviet court. Moreover, it extends them to damages for delay in delivery: the same commissions and omissions which make the owner liable for loss of or damage to cargo make him liable for damages from delay in delivery (s. 116). It makes the bill of lading conclusive, and not merely *prima facie*, evidence as against the owner (s. 78). Probably, under the Code, a charterer is entitled to dispatch money unless his right is expressly excluded by the charter (s. 90).

It would, however, be quite wrong to think that the Code is favourable throughout to the cargo-interests. On the contrary, the Code bristles with provisions, whether intentional or not, which would make the position of a Soviet charterer miserable indeed, if strictly insisted upon by owners.

Bills of Lading.—The only bill of lading known to the Code is a "received for shipment" bill of lading. "After receiving the goods for carriage, the carrier is obliged, on demand of the shipper, to issue to him a bill of lading. . . ." (s. 78). It is easy to recognize here the Hague Rules, Art. III (3). However, in the Hague Rules, Art. III (3) is followed by III (7), and under their combined effect the right of the shipper to demand a "received for shipment" bill of lading is not his only right. He may, if he is so minded, demand a "received for shipment" bill of lading immediately after the handing over of the goods into the charge of the carrier, but he may also prefer to wait until the completion of the loading and to demand then a "shipped" bill of lading; or he may take out a "received for shipment" bill of lading and change it for, or convert in into, a "shipped" bill of lading after the loading. There is no provision similar to the one contained in the Hague Rules III (7) in the Soviet Code. The result is that under the Code, in the absence of any agreement to the contrary, the owner is obliged to issue a "received for shipment" bill of lading immediately after the receipt of the goods into his charge, but at no time may he be compelled to issue a "shipped" bill of lading. To appreciate what that would mean for Soviet charterers if insisted upon by owners, it is only necessary to remember that not a single one of the big trades in which the U.S.S.R. is engaged (timber, grain, sugar) admits "received for shipment" bills of lading.

Charters.—The extension of the principles of the Hague Rules to charters is *prima facie* certainly in the interest of charterers, but it must be remembered that the Hague Rules are a double-edged weapon; they impose responsibilities and liabilities on owners, but also give them rights and immunities. Under the Hague Rules, the liabilities and responsibilities of the carrier may not be dispensed with by any agreement between the parties (III, 8), whilst he is at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities. The position is different under the Soviet Code; when that Code prohibits a departure from its rules, it does not discriminate between shipowners and cargo-owners.

Owner's Lien for Freight.—S. 112 of the Soviet Code consists of 5 subsections. Subs. 1 reads as follows: "The carrier is entitled to refuse delivery until the payment to him of the freight and of all other payments due to him under the contract of carriage by sea." Subss. 2–4 reproduce (with alterations) the first two paragraphs of Art. III (6) of the Hague Rules. Then comes subs. 5: "Any agreement contradicting this section shall be void." It is an arguable question whether an agreement whereby the carrier undertakes to release the goods without having been previously paid his freight and other charges is not void under the Soviet Code. S. 112 says in terms that, any agreement to the contrary notwithstanding, the owner is entitled not to deliver the goods until the payment to him of the freight together with all other charges which may be due to him under the contract of carriage. Against that it may be said that in cases when the freight does not fall due until after delivery, nothing is due to the carrier on delivery, and therefore s. 112 does not apply. On the other hand, it is quite clear that a surrender by the owner of his lien for freight or other charges which may become due to him on or before delivery is void under the Soviet Code. The very wide range of application of the owner's lien under the Soviet Code must be taken in consideration. In English law, the law of the country with the greatest shipping interests in the world, there is no lien even for freight unless the freight is payable simultaneously with the delivery of the goods; there is in English law no lien for dead freight, demurrage and many other charges which may be due to the owner under the contract of carriage. The lien of the Soviet Code is for *all payments* which may be due to the owner under the contract of carriage. The conclusion seems inevitable that a clause in a charter whereby the owner undertakes to issue bills of lading clean from any claims for dead freight or demurrage is void in Soviet law. Indeed, such an agreement amounts, or may amount in certain circumstances, to the renunciation by the owner of his lien over the goods for dead freight or demurrage, and under the Code such an agreement is entirely void. The owner's lien for freight payable on delivery does not affect a shipper who is a seller c.i.f., as almost every Soviet shipper is. Under a contract c.i.f. the freight is usually paid by the buyer for the account of the seller, who credits the freight to the buyer in his invoice, and the shipper-seller is in no way harmed by the right of the owner to retain the goods until the payment of the freight. The position is quite different in respect of dead freight or demurrage at the port of loading. A bill of lading tainted with a claim for dead freight or demurrage, or for any other payment for which, as between seller and buyer, the seller remains liable, may not be a clean bill of lading under the contract of sale. Through the contract of sale the owner's claim for anything above the bill of lading freight may involve the shipper in difficulties of a most dangerous nature, and the charterer may have the greatest interest in making sure beforehand that, whatever his own responsibility as against the owner, the bills of lading will be free from any claims above the freight. Under the Soviet Code that seems to be an unobtainable object.

Lay-days.—Probably, under the Code, the owner is not obliged to wait for cargo a single moment after the expiry of the lay-days, unless demurrage is agreed upon in the charter; after having loaded the quantity of cargo which has been brought alongside during the lay-days, he may sail and make all his claims under the charter. The rules of the Code as to lay-days and demurrage are extremely short. S. 89 leaves the question of lay-days to the agreement of the parties or, in the absence of any agreement on that point, to the customs of the respective ports. S. 90 does the same in respect of demurrage. The reference of the Code to the local customs of the respective ports again reminds one of the gulf which still exists in Soviet Russia between Acts and realities. There used to be local customs in the Russian ports before the Revolution, but they could hardly have survived fifteen years of the Soviet regime, which is the very negation of anything customary. The conditions which lead to the formation, or allow the existence, of customs capable of supplementing the general law or private agreements are entirely absent in Soviet Russia. There may be, and undoubtedly are, in the Soviet ports all kinds of by-laws and arrangements, but there can be no customs there. Moreover, in so far as the duty of the ship to wait for cargo after the expiry of the lay-days is concerned, the reference of the Code to the local customs is undermined by the Code itself. S. 91, the third and last section of the Code dealing with lay-days and demurrage, enacts that in cases when the charter covers the whole ship the master may not refuse to load the quantity of cargo brought alongside " before the expiry of the lay-days, or before the expiry of the time for demurrage if demurrage has been agreed upon by the parties, even if the loading of the goods may detain the ship beyond the agreed time," against which the carrier is entitled to damages for detention. So, after all, the ship is not obliged to wait for cargo after the expiry of the lay-days (or even to load the cargo which is already alongside provided it had been brought there after the expiry of the lay-days) unless demurrage had been agreed upon between the parties. English law is more merciful to the charterer. At the price of paying damages for detention the charterer can keep the ship waiting until his delay frustrates the contract. German law allows the master to sail immediately after the expiry of the lay-days unless demurrage is provided for by the charter, but in German law an owner intending to exercise his right to sail must notify the charterer of his intention at least three days before the actual sailing; otherwise the lay-days continue to run. There is no such safeguard for the charterer in the Soviet Code.

Identification of Shipper with Charterer.—The Soviet Code throughout identifies the charterer with the shipper. Chapter Y, part I, dealing with contracts of carriage of goods by sea, begins with s. 73, which reads as follows: " Under the contract of carriage of goods by sea, one party (the freighter, the carrier) undertakes to carry some cargo in a ship from one place to another by sea, whilst the other party (the charterer, the shipper) undertakes to pay the agreed remuneration (freight)." S. 73 is the only one in which the expression "charterer" can be found. Later on the word "charterer" falls out, and only "shipper" remains. "A charter must be under the joint signatures of the carrier and the shipper. . . ." (s. 77); "shipper" here cannot mean anyone else but the charterer. The implications of that identification of the shipper with the charterer must be far-reaching and chiefly to the detriment of the cargo-interests. Suffice it to say that under the Code an owner is entitled to refuse to issue a bill of lading to anyone except the charterer himself. My illustrations have been taken at random, and they can easily be multiplied; some additional ones, perhaps even more striking, can be found farther on. The last thing to be said about the Soviet Code is that it is biased in favour of the cargo-interests.

Difficulties in Framing the Code.—When dealing with the Soviet Code, it is only fair to bear in mind the exceptionally great difficulties with which its framers had to struggle. Although Russian maritime trade was always considerable, Russia never was a maritime country. Before the Revolution, her maritime trade was carried out chiefly in foreign bottoms. Charters for voyages to and from Russia were made, and disputes under such charters were fought out or settled in England much more often than in Russia. Enactments relating to maritime law formed book 2 of what, in the absence of a more suitable expression, may be called the Tsarist Commercial Code, but they were to a great extent obsolete and without practical importance. Plainly speaking, Tsarist Russia had no maritime law of her own. There was a slow change in the position with the general growth of Russian trade and industries during the thirty to fifty years before the Revolution. New shipping companies, even though with foreign capital, were formed under Russian law with head offices in Russia subject to the jurisdiction of the Russian courts. The coastal trade was increasing from year to year. A commission was appointed to prepare a draft of a maritime Code. Then came the war and the Revolution.

Under the Soviet regime the conditions for the growth of a Russian system of maritime law became immeasurably worse. Tsarist Russia had no maritime law of her own, but she was preparing herself for having it; she had her private law as well as judges and lawyers who believed in the necessity of a legal system based on private enterprise and freedom of contract and were qualified to contribute towards the development of such a system. Under the Soviet regime anything at all savouring of private law is admitted only on sufferance. Whether Russian maritime trade became under the Soviets greater or whether it became smaller in volume than it was before the Revolution, in any case it was kept by the Soviets until most recently at a greater distance from Russian lawyers and from the Russian courts than ever before. As a rule, the Soviet Government sold for export, bought for import and chartered foreign steamers through its Trade Delegations and other Agencies situate abroad, and not in the U.S.S.R. The number of cases arising out of the Russian maritime trade greatly increased in the English courts after the Soviet Revolution, but until recently diminished to almost complete disappearance in the Russian courts. The framers of the Soviet Code had very little native material to build with.

Their difficulties were made still greater by the rule that a Soviet Code, at least a Soviet Code dealing with matters which are " bourgeois " in substance, must be short. Various forces and ideas contributed towards the formation of that rule. If you have to install into your house something you do not wish to have there, you will at least wish that it should be small. Then there is the belief that a judge untrained in legal intricacies will deal with a short Code with greater ease than with a long one. Be that as it may, such a rule undoubtedly exists, and the Soviet Maritime Code *is* short. In particular, the chapter dealing with contracts of carriage of goods by sea consists of 46 sections altogether as against the 107 sections of the German Code. It is, however, well known that the art of being short not at the expense of completeness and exactness is a very difficult one.

Contracts of Carriage.—The question of what became of the Hague Rules in the Soviet Code is of particular interest. Russia took no part in the international conferences which led to the Hague Rules Convention, and the adoption of the Hague Rules in her Code was therefore an act of free will; she took or rejected from the Rules what she thought fit, unhampered by any international obligations. Chapter Y of the Code begins with a definition of a contract of carriage of goods by sea (s. 73, cited above), and then proceeds to deal with the various points which may become relevant under such a contract more or less in the order in which they may arise in the course of the carrying out of a maritime voyage. Chosen bits of the Hague Rules, very often radically altered, are inserted in appropriate places. There is in the Soviet Code no provision similar to s. 3 of the British Carriage of Goods by Sea Act, 1924, which would oblige the carrier to insert some or any of the provisions of the Code in his bill of lading, or to refer to them or to pay homage to them in any way. The method of the Code in those cases where it wishes to assert itself even against any possible agreement of the parties is what may be called the prohibition, or the avoiding, of contracting out. S. 74 of the Code reads as follows: "The rules contained in this part" (*i.e.* the part dealing with contracts of carriage of goods by sea) "shall be applicable in cases when the parties have not agreed to the contrary. However, in cases particularly specified in this chapter, any agreement of the parties which is not in accordance with these rules shall be void." S. 5 reads as follows: "Clauses providing for the application of foreign law are admissible in contracts dealt with by this Code only in so far as the parties are entitled to depart from the rules laid down by the Code." The rules of the Code are thus divided into two groups. The rules of one group operate unless they are excluded by the parties in their agreement. The rules of the other group operate whether the parties like them or not. It is open to the parties to enter or not to enter into a contract of carriage of goods by sea ; but if the parties do enter into such a contract the rules of the second group become a part of the contract, however clearly the parties may have contracted them out. Unlike the British Act or the Palestine Carriage of Goods by Sea Ordinance, dealt with in *The Torni*,[1] the Soviet Code does not take the trouble of inviting the parties to be good ; it directly puts every contract of carriage which it purports to govern under the operation of certain rules which may not, and even cannot, be avoided by the parties, however hard they may try. S. 4 of the Code defines the sphere which the Code claims for its domination. As to contracts of carriage of goods by sea, s. 4 distinguishes three kinds of contracts : (1) contracts for carriage between two non-Soviet ports ; (2) contracts with a Soviet port of destination and (3) contracts with a Soviet port of loading. Contracts (1) are governed by the Code if the case is tried by a Soviet court and at least one party to the contract is a Soviet subject or a Soviet legal entity. Contracts (2) are governed by the Code provided the case is tried by a Soviet court. Contracts (3) are governed by the Code without any qualifications. Naturally, that claim to govern does not exclude a considerable freedom of the parties in the framing of their particular contracts according to their own wishes. Even a clause placing the whole contract under the operation of some foreign law is not entirely void. There are, however, limitations to the freedom which Soviet law allows to parties in a contract of carriage which it purports to govern. Certain rules specifically marked in the Code for that purpose are deemed by the Soviet Code to be contained in every contract of carriage governed by the Soviet law, and in Soviet law those rules may not, and cannot, be eradicated from such a contract by any agreements between the parties—even by their agreement to put the whole contract under the operation of some foreign law. Provided the contract is one which the Soviet Code claims to govern, Soviet law will treat the foreign law clause itself as a clause in a Soviet contract of carriage liable to be cut down in its effectiveness in accordance with the requirements of the Soviet law.

Statements in Bills of Lading.—Two sections of the Code of very great importance can be most easily traced to the Hague Rules : s. 82 dealing with the question as to what a bill of lading must state, and s. 116 dealing with the question of the carrier's liability for loss and damage. S. 82 is really a blend of para. 643 of the German Commercial Code with the Hague Rules III (3). S. 116 is based entirely on the Hague Rules, although it is in no wise a literal reproduction of anything in the Hague Rules. S. 82 reads as follows :

> A bill of lading must state : (*a*) the name of the ship, if the cargo is to be carried by some particular ship ; (*b*) the name of the carrier ; (*c*) the place of loading ; (*d*) the name of the shipper ; (*e*) the place of the destination or,

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[1] [1932], P. 29 and 78.

in cases of charter-parties, the place of the destination or of the direction of the ship ; (*f*) the name of the consignee (a personal bill of lading) or a statement that the bill of lading is issued to the order of the shipper, or the name of the consignee together with the statement that the bill of lading is issued to his order (a bill of lading to order) or a statement that the bill of lading is issued to the bearer (a bearer bill of lading) ; (*g*) the description of the goods and the marks which they bear as well as the number of packages or the quantity or measure (weight or volume) ; (*h*) the freight as well as other payments due to the carrier, or a statement that the freight is payable as per charter-party or some other document, or a statement that the freight has been fully paid ; (*i*) the date and the place of the issue of the bill of lading ; (*k*) the number of copies issued ; (*l*) the signature of the carrier or of the master.

If, at the carriage of bulk cargoes, the data under " *g* " have not been checked, the carrier may insert them in the bill of lading with an appropriate reservation. A similar reservation may be made by the carrier in cases of carriage of any goods provided he has reasonable grounds to think that the data under " *g* " are not accurately stated by the shipper and he has had no possibility of checking them.

Other clauses and reservations may be inserted in the bill of lading by the agreement of the parties.

A document not containing any of the data enumerated under " *a–l* " is not a bill of lading.

One of the first things which strike one in s. 82 is its omission to mention the apparent order and condition of the goods (the Hague Rules, III, 3). The importance for the shipper of the statement in the bill of lading that the goods were in a good order and condition at the time of shipment can hardly be exaggerated. In particular, it is certainly arguable whether a bill of lading without such a statement is a clean bill of lading and is a proper document under a c.i.f. contract. However, under the Soviet Code, the master may refuse to state anything in the bill of lading as to the apparent order and condition of the goods unless he expressly undertook such a duty under the charter or in some other agreement preceding the issue of the bill of lading. It is true that neither does para. 643 of the German Code provide for such a statement in the bill of lading, but the omission of para. 643 of the German Code is more than remedied by para. 658 of the same Code which makes the bill of lading in the hands of a *bona fide* holder conclusive evidence that the goods were in good order and condition at the time of shipment unless the contrary appears from the document itself. There is no section in the Soviet Code similar to para. 658 of the German Code.

Even more striking is the threat of s. 82 not to recognize as a bill of lading any document omitting to state *any* of the particulars enumerated in its 11 points. That threat transforms the bill of lading into a formal document similar to a bill of exchange. There is no such threat either in the German Code or in the Hague Rules.

As to German law, it is clear beyond any possibility of doubt that the only meaning of the enumeration contained in para. 643 of the

German Code is that, in the absence of any agreement to the contrary, the shipper may demand a bill of lading stating all the particulars of para. 643, and the carrier satisfies his obligation to issue a bill of lading if he hands over to the shipper a document containing all the particulars of para. 643. An agreement to reduce the contents of the bill of lading to the bare minimum which is essential for every obligation is perfectly valid in German law. At the same time, a document omitting to state anything beyond that minimum, although it may be of a lower marketable value, does not cease to be a bill of lading. It is possible that under the Hague Rules the right of the shipper to demand a bill of lading with all the particulars enumerated in Art. III (3) may not be contracted out. Whether that is so or not seems to depend on the correct interpretation of the Hague Rules, III : is an agreement between the shipper and the master which releases the master from his duty to state the marks on, or the weight of, the goods in the bill of lading one relieving the carrier or the ship from liability for loss or damage to or in connexion with the goods which are to be carried ? In any case, there is not the slightest foundation for the proposition that if the bill of lading issued by the master and accepted by the shipper in fact omits to state any of the particulars enumerated in the Hague Rules III (3), then the document is not a bill of lading at all under the Rules. Such a proposition would be a terrible blow in the first instance to the cargo-interests, the protection of which was the primary concern of the Hague Rules.

As to the requisites of s. 82 themselves, some of them are so ambiguous and uncertain that in particular cases it may be not at all easy to say how they are to be complied with or whether they have been complied with ; whilst some others, although reasonably clear, are in fact hardly ever complied with in the Soviet ports. The result is that the vast majority of the so-called bills of lading issuing from the Soviet ports are not bills of lading in Soviet law.

According to s. 82 (*a*) the bill of lading must state the name of the ship if some particular ship has been agreed upon. The German Code says simply that the bill of lading must state the name of the ship. The wording of the Soviet Code is evidently intended to meet the case of the big liner companies which (not in Soviet Russia) accept goods for carriage not by some particular ship but by any ship of their line, and is in accordance with the fact that the only bill of lading known to the Soviet Code is a " received for shipment " bill of lading. All this is quite understandable, but the difficulty is how is anyone, by looking at the document purporting to be a bill of lading but omitting to name any particular ship, to know whether the omission is due to the fact that no particular ship had been agreed upon and is therefore harmless, or is in contravention of s. 82 and therefore disqualifies the document as a bill of lading ? S. 82 (I*b*) requires that the bill of lading should state the name of the " carrier," *i.e.* of " the person who exploits the ship in his own name " (s. 3 of the Code). The German Code requires that the bill of lading should state the name of the master. To substitute the name of the carrier for that of the master in the bill of lading may be a very reasonable and advisable thing to do, but the fact is that the vast majority of the bills of lading issuing from the Soviet ports do not state the name of the carrier. The Soviet outward trade is carried on chiefly under charters which provide for their own forms of bills of lading, forms in which there is no room for the name of the carrier. The agreement in the charter as to the form of the future bills of lading is perfectly valid in Soviet law. There is nothing in s. 82 or anywhere else in the Soviet Code which would invalidate an agreement between the charterer and the carrier as to the form of the document which is to be issued by the carrier after receiving the goods into his charge. The particulars enumerated in s. 82 are not intended as particulars the insertion of which in the document the shipper would always be entitled to claim, any agreements to the contrary notwithstanding. They may be validly contracted out, but nevertheless are requisites without which there can be no bill of lading. It is true that under s. 78, cited above, the carrier must issue to the shipper a bill of lading, and under s. 82 no document is a bill of lading unless it contains certain particulars enumerated therein. However, s. 78 is not accompanied by the familiar proviso that no departing agreement shall be valid. S. 78 belongs therefore to the provisions of the Code which operate only if they are not excluded by the parties in their agreement. The position is therefore this, that the Soviet Code allows the parties to make their own agreement as to the form of the future document, but disqualifies as a bill of lading every document omitting to state any of the particulars enumerated in s. 82. In any case, whether the parties may or may not validly agree that the document which the carrier is to issue to the shipper should omit the name of the owner, the fact remains that the overwhelming majority of all the so-called bills of lading issued from the Soviet ports do not state the name of the carrier. Therefore, they are not bills of lading at all in Soviet law. No document is a bill of lading if it omits to state the name of the shipper ; but in view of the identification throughout of the shipper with the charterer in the Code, it is not easy to say the omission of whose name, that of the shipper or of the charterer, is fatal to the document as a bill of lading in cases when the bill of lading is preceded by a charter.

It is of itself an extraordinary thing to disqualify as a bill of lading every document omitting to state all the marks which may happen to be on the goods, but, as in the case of a document omitting to name any particular ship, the additional difficulty is how is one by looking at the document to know whether or not it states all the marks which are on the goods ? The rule that no document may be a bill of lading unless it states the freight and all other charges which may be due to the owner is especially bound to cause trouble and confusion. Again and again the question arises, how is one by looking at a document which is blank as to some particular point to know whether that is so because there was nothing to state or notwithstanding the fact that there was something to state? The whole position becomes turned upside down. Not the owner but the shipper, and through the shipper the indorsee or consignee, become the parties most interested to see that no possible claim of the owner should be omitted in the bill of lading, since any such omission kills the document as a bill of lading. According to s. 76 of the Code, "the relations between the carrier and the consignee are as they appear from the bill of lading," but in order that there might be a consignee at all, with claims in his own right, there first of all must be a bill of lading. However, if the document omits to state any of the particulars enumerated in s. 82, as, for instance, some payment which may be due to the owner, it is not a bill of lading.

One easily recognizes s. 5 of the British Carriage of Goods by Sea Act behind the first sentence of subs. 2 of s. 82 of the Soviet Code and the proviso to Art. III (3) of the Schedule to the British Act behind the second sentence of the said subs. 2. However, the points of difference between the British Act and the Soviet Code, whether intended by the Soviet legislator or not, are very great and numerous. The scheme of the British Act and its Schedule are well known. The shipper may demand the insertion of certain data in the bill of lading as furnished in writing by himself, and those data, when inserted in the bill of lading, become in the hands of a *bona fide* holder of the bill of lading *prima facie* evidence as against the carrier—evidence the proving force of which may not be whittled down by any qualifications like "weight unknown," "marks unknown," etc. To that rule there are two exceptions, one in the Schedule and the other in the Act itself. Under the Schedule, III (3), proviso, the carrier may refuse to insert in the bill of lading any data "which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking." It is important to notice that the right of the carrier in such a case is to refuse the insertion of the shipper's data in the bill of lading altogether, and not to qualify them as inserted by any weakening clauses. Either the number of packages is stated in the bill of lading or it is not. If it is stated it is *prima facie* evidence as against the owner, however qualified it may be in the bill of lading. The exception which is in the Act (s. 5) is of a substantially different nature. In certain exceptional cases specified in the Act, the carrier may effectively qualify the data of the bill of lading as to the weight of the goods. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading. That distinction between the right of the carrier to refuse the insertion in the bill of lading of the shipper's data and his right to qualify them either escaped the notice of the Soviet legislator or was intentionally rejected by him. The Soviet Code deals only with the right of the carrier to qualify the data of the bill of lading. Logically, it could not be otherwise, since under the Code a document omitting altogether to state, for instance, the weight of, or the marks on, the goods is not a bill of lading at all. The rule of the British Act, s. 5, as to the weight of certain bulk cargoes is extended in the Soviet Code to all bulk cargoes and to all data which may concern such cargoes, including for instance even their description. If the cargo is a bulk cargo any data concerning it may be qualified in the bill of lading provided they have not been checked. The Code does not concern itself with the question : not checked by whom or why ? As regards cargoes other than bulk cargoes qualifying clauses are under the Code admissible and effective in every case when under the schedule to the British Act the only right of the carrier would be to refuse to insert the shipper's data in the bill of lading. It must be borne in mind that under s. 82, subs. 3, all kinds of conditions and reservations may be inserted in the bill of lading by the agreement of the parties. A qualifying clause in a bill of lading is, therefore, always effective in Soviet law, and the only question is, in what cases may the carrier qualify the data of the shipper in the bill of lading even against the shipper's opposition ? Very little indeed is left in the Soviet Code of the Hague Rules in so far as the contents of a bill of lading are concerned, although the intention of the Soviet legislator to follow the Hague Rules in this respect is quite evident.

Carrier's Liability.—S. 116 of the Code reads as follows :

> The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, unless the loss, damage or delay has been caused by circumstances which could not be prevented by the cares of a diligent carrier, in particular by : (*a*) *force majeure*, (*b*) perils and accidents of the sea and other navigable waters, (*c*) fire, (*d*) acts and orders of authorities (seizure, arrest), (*e*) acts of war and civil commotions, (*f*) acts or omissions of the shipper or the consignee, (*g*) qualities of the goods (internal deterioration and normal wastage) and their latent defects, (*h*) insufficiency of packing which could not be noticed by external inspection, (*i*) insufficiency or inadequacy of marks, (*j*) fall or disease of the animals carried, (*k*) acts or omissions of the master, other members of the crew or the pilot in the navigation or the management of the ship excepting however their acts and omissions in receiving, loading, stowing, keeping, unloading and delivering the goods, (*l*) saving life, ships or cargoes.
>
> The liability under this section begins from the moment of the receipt of the goods for carriage and continues until the moment of their delivery.
>
> Any agreements contradicting this section shall be void except in so far as they deal with the liability for the time between the receipt of the goods and their loading into the ship or between their unloading and their delivery.

Without going into a detailed analysis of s. 116 and into its comparison with the Hague Rules, I shall only point out the unusual fate of the famous "management or navigation of the ship" in the Soviet Code. All over the world "the navigation or management of the ship" is contrasted with the handling of the goods as two species of some higher genus. In the Soviet Code the management or navigation of the ship became somehow a genus of which the handling of the goods, including their loading, stowing and unloading, is a species.

Jurisdiction of the Soviet Courts.—The Soviet Maritime Code has remained until the present rather a dormant force. It has been passed by the Soviet legislator without any too prolonged deliberations or hesitations, as every other private law Act, and, like almost every other private law Act, has been immediately shelved. After its passing as before, the Soviet institutions continued to satisfy their requirements in foreign tonnage by charters made on foreign markets which, in tacit agreement with foreign owners, they left to foreign law and foreign courts. The reasons for that avoidance of the Soviet Code were rather commercial and tactical and not legal or technical. As stated above, the Soviet Code claims for itself every contract of carriage with a Soviet port of loading, whatever the court trying the case, and every contract of carriage with a Soviet port of destination if the case is tried by a Soviet court. From the point of view of jurisdiction, there can hardly be any difficulty in bringing any case under a charter for a voyage to or from Russia before a Soviet court. Soviet charterers certainly are under the jurisdiction of the Soviet courts. As to foreign owners, those may be brought before a Soviet court in many ways, and in particular : (1) under s. 26 of the Code of Civil Procedure of the R.S.F.S.R. any personal action against a person not residing in the U.S.S.R. is cognizable by the Soviet court within whose district any property of that person is situate. In this way a personal action against a foreign owner may be started in a Soviet court immediately his ship comes into Soviet territorial waters and until her leaving such waters ; (2) under s. 28, the Soviet courts have jurisdiction over disputes arising out of contracts, the performance of which as agreed or by the nature of things was to take place within the U.S.S.R. It must be borne in mind that rules of jurisdiction are in Soviet law *publici juris* and therefore *privatorum pactis mutari non possunt.* Nevertheless, hardly any considerable application was made of the Soviet Code even in the U.S.S.R. until recent times. Foreign owners naturally preferred their own courts, and as to Soviet charterers they for some reasons abstained until now from applying to the Soviet courts in their disputes with foreign owners.

There are, however, clear signs that a change in the attitude of Soviet charterers has already taken place and will make itself felt by foreign owners in the near future. In June 1933 the Presidium of the Supreme Court of the R.S.F.S.R., after hearing the complaint of the All-Union Chartering Combine that "some people's courts refuse to entertain actions of Soviet charterers against foreign owners for claims arising out of charters," issued the following ruling : "Actions of Soviet charterers against owners of foreign ships lying in Soviet ports for dissolution of charters and damages to charterers for breach of contract, are cognizable by the people's courts and by the provincial courts respectively according to the value of the claim. The writ must be served on the master as the owner's representative. The courts must give such actions an early trial. Having in view that the leaving by the ship of the Soviet port may make it impossible for the plaintiff to bring his action in a Soviet court, the courts may, at the application of the plaintiff and provided the claim is supported by sufficient evidence, order the arrest of the ship by way of security of actions, complying at that with the rules laid down for such occasions in the Maritime Code."

Security of Actions.—The ruling of the Supreme Court raises many questions. Its reference to " security of actions " cannot be misunderstood. There is in the Code of Civil Procedure of the R.S.F.S.R. a whole chapter, c. ix, headed " Security of actions." Like some rules of order L of the English R.S.C., it deals with the right of the court to secure the subject-matter of the litigation or the claim of the plaintiff *in a pending action.* First of all, there must be a pending action. If there is an action, the court may make provision for its security, in particular by arresting some property of the defendant. However, in the ruling of the Supreme Court the arrest of the ship is authorized not for the purpose of securing a pending action, but for the securing of jurisdiction : " having in view that the leaving by the ship of the Soviet port may make it impossible for the plaintiff *to bring* his action in a Soviet court, the courts may . . . order the arrest of the ship." As a measure *ad foundandam jurisdictionem* the arrest of the ship is either unnecessary or impossible. Either the ship is in the Soviet port or she is not. So long as the ship is in the Soviet port, an action against her owner may be started in a Soviet court under s. 26 of the Code of Civil Procedure, cited above, without arresting the ship. After the ship has left the port, her arrest becomes impossible. Why then arrest the ship ? The reference of the Supreme Court to the rules laid down for such occasions in the Maritime Code explains nothing. C. xiii of the Maritime Code, consisting of two sections (239 and 240), is headed " The detention of ships." Under s. 239, anyone alleging to have a claim against a ship or her cargo based on general average, collision or salvage may apply to the captain of the port where the ship lies, and the captain may detain the ship for not more than seventy-two hours ; if his order is not approved by the court within those seventy-two hours the ship is released. S. 240 reads as follows : " A ship which is under a voyage may not be arrested either by the court, or under s. 239, for any claim not connected with the said voyage, unless the action relates to the ownership in the ship." Nevertheless, the ruling of the Supreme Court given in answer to an application or complaint of the All-Union Chartering Combine is a clear sign that in future foreign owners participating in the Soviet maritime trade will have more to do with the Soviet courts than heretofore.

Applicability of Soviet Code in English Courts.—The time is also not far distant when the Soviet Maritime Code will make its appearance in the English courts. The reasons why it was ignored until now in litigation in this country arising out of the Anglo-Soviet maritime trade are more or less the same as for its avoidance within the U.S.S.R. plus probably in some cases the ignorance by the foreign party of the fact that such a Code exists and can have a bearing on the case. Of course, the Soviet Maritime Code cannot have the same sphere of application in an English court as in a Soviet court. The question as to when the Soviet Maritime Code may become applicable in an English court is entirely outside this article, and I shall point out only a few facts which may have a bearing on this problem. A certain portion of the Soviet maritime trade is already carried on under charters in which both parties, the carrier and the charterer, are Soviet institutions. For instance, the Exportless, the Soviet timber-exporting organization, charters from the Sovtorgflot, the Soviet shipping organization, ships either owned by the Sovtorgflot or time-chartered by it from foreign owners. It is very unlikely that any dispute between the Sovtorgflot and the Exportless under their charters will ever come before an English court, but this may easily happen with disputes between English holders of bills of lading issued under such charters and the Sovtorgflot as the carrier or the Exportless as the seller c.i.f. It is very probable that an English court will hold such bills of lading governed by Soviet law. Another method through which the Soviet Maritime Code may possibly make its entrance into the English courts is by way of its compulsory rules, which may not be contracted out. The problem of compulsory rules has been recently discussed in *The Torni*, [1932] P. 78 and in *The St. Joseph*, [1933] P. 119–35. In the latter case Bateson J. was inclined to agree that a bill of lading issued in a country which adopted the Hague Rules is governed by those Rules, even though there is no reference to them in the bill of lading, if: (1) the bill of lading was a negotiable bill and was negotiated; and (2) a bill of lading which leaves out any statement that it is governed by the Rules has such a term implied in it under the law of the country where it is issued. A bill of lading issued to a Soviet shipper in a Soviet port and indorsed by him to an English buyer c.i.f. clearly satisfies the first condition. The second condition is undoubtedly satisfied by the Soviet Maritime Code as regards its compulsory rules.

Administration of the Code.—The administration of the Soviet Maritime Code whether by the Soviet courts or by the foreign courts will be a quite new legal experiment. Soviet Russia is not a backward country—she is a unique country. The Soviet system is incompatible with private law as the law of trade and industries. A lawyer studying the Soviet regime must entirely acquit it of any compromises with private (commercial) law; an attempt at a compromise was made during the so-called New Economic policy (the Nep, 1921–6), but failed and has been abandoned. One must assume that the Supreme Court wished to be accurate in its ruling affecting foreign owners, but the slovenliness and slackness of its language and thought even on such an occasion are as characteristic of the present legal position in Russia as the unwillingness of some of the people's courts to have anything at all to do with foreign ships. Private law is not and cannot be Soviet Russia's strong point. The Soviet private law Codes are only so much paper in so far as intra-Soviet relations are concerned. Their technical standard is extremely low ; they are simply incapable of sustaining the weight of the ordinary rules of legal interpretation and construction. The reason is not that there are no lawyers in Russia, but that a regime which is the very denial of private law cannot create private law Codes. A Maritime Code is not a self-contained legal system ; it is only a small part of the law of a country. Private law may be wanted by Soviet Russia only for her foreign trade, but can any country have two legal systems—a socialist one for her whole life and a capitalist one for her foreign trade ?

GERMANIC LAW VERSUS ROMAN LAW IN NATIONAL SOCIALIST LEGAL THEORY.

[*Contributed by* LAWRENCE PREUSS, ESQ., *Assistant Professor of Political Science, University of Michigan.*]

Legal Reform under the Third Reich.—" National Socialism," Adolf Hitler has said, " is a *Weltanschauung*." [1] It differs from previous German political movements in that it envisages the complete renovation of all forms and expressions of national life in conformity with what it conceives to be the German spirit—the *Volksgeist.* As a system of thought embracing every social and cultural sphere, National Socialism has also a *Rechtsanschauung*, which demands the substitution of a " German common law " for the " materialistic " Roman law on which the present legal order is based.[2] This principle has been incorporated in the " Program of the N.S.D.A.P.," [3] and has furnished the basic text for the elaboration of a National Socialist theory of law.

The fundamental requirement of legal reform under the Third Reich is that " a law must be given to the German people which is German according to its content and is suited to the German nature. Everything foreign which has been imported in the course of two thousand years of legal history and has been received under the name of ' Roman law ' is to be rejected. To the German people is due a German law. . . ." [4] The present law is branded as a " Roman-Byzantine-Oriental " system,[5] or as a " Jewish-Roman " legal order,[6] and it is charged that its " reception " in the fifteenth and sixteenth centuries dissolved " every connexion between law and race, between law and morality, between law and life. . . . Rigid, rational clarity has been purchased at the cost of firm legal conviction and of the moral idea in law. Law has been disrobed of its moral supremacy, and degraded to the status of the plaything of a learned *Begriffsjurisprudenz*, of pettifogging distortion, and of a soulless legislative machine. From their position as the ruler in legal life, the people have been cast down to that of an object. The law of the people has become the law of the jurists. The law no longer served the life of the people, but the people became the subject of inflexible paragraphs. Every tendency of the law in conformity with the laws of life, every contact with the natural data of blood and race (and, thereby, the necessary fusion of morality and law, of legal sentiment and law), were rent apart and destroyed. The law, which was not derived from the people and was not adapted to it, became foreign." [1]

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[1] See Hitler's speech on " Nationalsozialismus als Weltanschauung," at the Reichskulturtag, Nürnberg, September 1, 1933. *Völkischer Beobachter*, September 2, 1933.

[2] G. R. Schmelzeisen, *Das Recht im nationalsozialistischen Weltbild*, 1934 (*Neugestaltung von Recht und Wirtschaft*, 2 Heft), p. 7.

[3] Adopted at Munich, February 25, 1920. Point 19 provides : " Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht." See Gottfried Feder, *Programm der NSDAP und seine weltanschaulichen Grundgedanken*, 1933 (*Nationalsozialistische Bibliothek*, 1 Heft, 101–10, Aufl.).

[4] Helmut Nicolai, *Die rassengesetzliche Rechtslehre*, 1932 (*Nationalsozialistische Bibliothek*, 39 Heft), p. 6.

[5] *Ibid.*, p. 23.

[6] *Ibid.*, p. 55 ; also, " Nationalsozialistische Rechtsgestaltung," speech of *Reichsjustizkommissar* Dr. Frank at Berlin, January 30, 1934. *Völkischer Beobachter*, February 2, 1934.

Advancement of Racial Element.—The German people or *Volk*, whose spirit is to be reflected in the National Socialist legal system, is conceived as a social group united by ties of common blood—a *Blutgemeinschaft*.[2] Common speech and a sense of common political destiny are recognized as contributory factors in the formation of a people, but are held to be of secondary importance. Race alone is decisive.[3] A *Volk* is thus a race community,[4] and the *Volksgeist* is synonymous with the *Rassenseele*.[5] Although the Germans are admittedly a racial mixture, it is claimed that they constitute a *Volk* by reason of their predominantly Nordic blood.[6] The highest task of the National Socialist State, Adolf Hitler has stated, is to preserve and to advance to a position of dominant influence this valuable racial element, " which, through its heroism alone, and thanks to its inner gifts, has created the German people out of a conglomerate of elements."[1]

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[1] Nicolai, *op. cit.*, p. 20. Also, Gerd Rühle in *Völkischer Beobachter*, August 31, 1933.

[2] M. R. Gerstenhauer, *Der völkische Gedanke in Vergangenheit und Zukunft*, 1933, pp. 105, 112. Also, *Nationalsozialistisches Strafrecht: Denkschrift des preussischen Justizministers*, 1933, p. 22.

[3] Alfred Rosenberg, " Die rassische Bedingtheit der Aussenpolitik," speech at Reichsparteitag, Nürnberg, September 1, 1933. *Völkischer Beobachter*, September 3–4, 1933; *Ministerialrat* Dr. Conti, in *J. B. Illustrierter Beobachter*, 1933, p. 1586.

Professor Hans F. R. Günther defines " race " as a " Menschengruppe, die sich durch die ihr eignende Vereinigung leiblicher und seelischer Eigenschaften von jeder anderen in solcher Weise zusammengefassten Menschengruppe unterscheidet und immer nur ihresgleichen hervorbringt." *Kleine Rassenkunde des deutschen Volkes*, 1933, p. 11.

For a scholarly survey of race theories in political thought, see Erich Voegelin, *Rasse und Staat*, 1933.

[4] " A *Volk* is a human community which lives in a determinate area, and has for a sufficiently long time been essentially unified in race and speech. . . . A *Volk* first becomes a nation when it attains a common activity of will. . . . A *Volk* is a natural community; a nation is a community of will." Theodor Steche, in *Völkischer Beobachter*, December 19, 1933.

[5] See Nicolai, *op. cit.*, p. 26.

[6] Schmelzeisen, *op. cit.*, p. 11; Günther, *op. cit.*, pp. 21–47, 118–38.

In National Socialist ideology the concept of race plays a rôle of similar importance to that of economic materialism in Marxist doctrine.[2] In theory, the State is merely the legal organization of the *Volk*, which, in turn, is conditioned by blood.[3] Every race produces its own *Weltanschauung*, and it is the task of National Socialism, as the movement of the " heroic man," to impress upon the life of the German people the *Weltanschauung* of its highest elements, which, by reason of their race, are capable of " heroic action."[4] The Aryan " race," and especially its Nordic branch, is alone held to possess the capacity for creating cultural values.[5] The whole of human history is explained in terms of the struggle between culture-building Aryans and the " lower races." Civilizations and empires fall when their Aryan or Nordic founders lower their racial level through intermixture with inferior peoples.[6]

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[1] " Nationalsozialismus als Weltanschauung," cited *supra*; also, *Mein Kampf*, 1933 (12 Aufl.), pp. 434–8.

[2] Theodore Heuss, *Hitlers Weg*, 1933, pp. 31, 32.

[3] " The national *Weltanschauung* sees the meaning of humanity in its original racial elements. In principle, it sees in the State only a means to an end, and conceives its purpose to be the maintenance of the racial existence of man. It consequently believes in no way in the equality of races, but perceives, together with their variety, their higher or lesser worth as well, and feels itself obligated through this perception to assert the victory of the better and stronger, and to demand the subordination of the worse and weaker, in conformity with the External Will which rules this universe." Hitler, *Mein Kampf*, pp. 420–1.

" In reality, the State is the political constitution and form of the blood-united *Volk*." Schmelzeisen, *op. cit.*, p. 21. Also, Gerstenhauer, *op. cit.*, pp. 105, 112, and Karl Lohmann, *Hitlers Staatsauffassung*, 1933, pp. 21 ff.

[4] Hitler, " Nationalsozialismus als Weltanschauung," cited *supra*. Also, Rosenberg, *Das Wesensgefüge des Nationalsozialismus*, 1933 (5 Aufl.), pp. 11 ff.

[5] " What we see before us to-day of human culture, of achievements of art, science and technology, is almost exclusively the creative product of the Aryan. This fact, indeed, permits the not unfounded conclusion that he alone was the founder of higher humanity in general, and, therefore, represents the prototype of what we understand by the term ' human being.' He is the Prometheus of humanity, from whose luminous brow sprang forth to all times the divine spark of genius. . . ." Hitler, *Mein Kampf*, p. 317. See M. Staemmler, *Rassenpflege im völkischen Staat*, 1933, p. 6.

[6] " The Aryan gave up the purity of his blood and thereby lost the place in Paradise which he himself had made. . . . The intermixture of blood and the lowering of the racial level thereupon conditioned, is the sole cause of the perishing of old cultures. . . . Every defeat may become the father of a later victory. Every lost war may become the source of a later uprising, every need the fertilization of human energy, and from every suppression may come the forces for a new spiritual rebirth —so long as the blood is kept pure." Hitler, *Mein Kampf*, pp. 324, 359. Also, Dr. Walter Gross, " Politik und Rassenfrage," speech at the Reichsparteitag, Nürnberg, September 1, 1933. *Völkischer Beobachter*, September 2, 1933.

If the German people had preserved their racial purity, Hitler states, they would be " rulers of the earth," and a world peace would have been attained—not " a peace resting on the palm leaves of tearful, pacifistic, hired female-mourners, but based upon the victorious sword of a people of rulers seizing the world in the service of a higher culture." *Mein Kampf*, p. 438.

Cultures blossom once more when there is a fresh infusion of Germanic blood.[1]

Racial Determinism in Legal History.—This theory of racial determinism has been carried over into the field of legal history, which is pictured as a long struggle between *Recht*, which emanates spontaneously from the Aryan or Nordic *Rassenseele*, and *Gesetz*, the law of external might, which is produced by inferior or mixed peoples. Upon this dogma has been erected a National Socialist legal theory which is called by Dr. Helmut Nicolai, its principal exponent, the "*Rassengesetzliche Rechtslehre*"—"Legal Theory according to the Laws of Race."[2] In the old German conception, Nicolai states, "law was innate and was transmitted by blood. As the blood, the inner nature, came from the gods, so also did the law. . . . Law (*Recht*) is a law of life, and is born with man, that is to say: every man brings with him social instincts which tell him how he must act in order to make possible an ordered life with other men. This instinct, which indicates the law, is the conscience. It is the social impulse, the legal impulse, which points out what is correct or false, what is good or bad."[3] Since law is an emanation of the *Rassenseele*, and therefore hereditary, every race possesses a legal system corresponding to its nature. A mixed people cannot produce a true law, since it lacks a unified *Weltanschauung* and a "pure" and "harmonious" "perception of life." "The man of pure race decides correctly—artlessly, surely, and instinctively. The mixed person must choose between various possibilities. He lacks firm feeling and singleness of conscience. He does not feel what is good and what is evil; he must first decide."[4] The "inborn capacity" of the racially pure man "to feel, to judge, to know what is right (*Recht*) and how one must act in order that peace and order may be preserved in the community, was transmitted to the Nordic man by his ancestors, by the gods themselves—not as a learned science, not as an externally transmitted wisdom, but through the natural disposition of the blood. Not everyone, therefore, can know the law, but only one whose race is pure, who has been produced in genuine marriage between like beings, and whose family tree is free from alien admixture. Law, therefore, can be known, established, proclaimed and announced only by Aryan, Nordic men. Hence, the Nordic man alone is destined to legal creativeness—that is, to the creation of law out of the original spring of wisdom."[1]

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[1] "Richtlinien für die Geschichtslehrbücher," by *Reichsminister des Innern* Dr. Frick. *Völkischer Beobachter*, August 16, 1933.

[2] Developed in *Die rassengesetzliche Rechtslehre: Grundzüge einer nationalsozialistischen Rechtsphilosophie*, 1932 (*Nationalsozialistische Bibliothek*, 39 Heft), in *Rasse und Recht*, 1933, and in numerous articles cited in the work first named, p. 270. Dr. Nicolai is *Regierungspräsident* at Magdeburg, *Leiter des Innenpolitischen Abteilung der Reichsleitung der NSDAP*, and has been engaged in the formulation of a project for the reconstruction of the Constitution of the Reich. See his *Grundlage der kommenden Verfassung*, 1933 (5 Aufl.), and *Der Staat in nationalsozialistischen Weltbild*, 1933 (*Neugestaltung von Recht und Wirtschaft*, 1 Heft).

[3] *Die rassengesetzliche Rechtslehre*, p. 13.

[4] *Ibid.*, p. 27.

The National Socialist legal theory acknowledges its indebtedness to the historical school of jurisprudence of the past century, but contends that Savigny's conception of the *Volksgeist* was "vague," "mystical,"[2] "colourless," and "empty,"[3] as the result of his ignorance of *Rassenkunde* and of the significance of the racial interpretation of history,[4] which, one writer has stated, "was the greatest discovery of the passing nineteenth century."[5] Only through a realization of the racial basis of the *Volk* is the true nature of the *Volksgeist* revealed. Viewed as the *Rassenseele,* Nicolai contends, it becomes a reality susceptible of scientific demonstration.[6]

Denunciation of Present "Jewish-Roman" System.—The above doctrines have been applied concretely to legal history as a justification for the National Socialist demand that a German common law replace the present "Jewish-Roman" system. Originally, it is stated, the forefathers of the Romans and Germans formed part of a single Nordic "*Urvolk*," possessing the same racial derivation, speaking a common language and living under the same law. While the Germans remained in northern Europe and thus preserved their racial purity, the forefathers of the Romans migrated to the south, where they came into contact with inferior Mediterranean peoples. The Nordic invaders established themselves as a ruling caste of alien conquerors and raised Rome to the position of a world empire. In the course of time, however, the Nordic patricians let down their racial barriers and intermingled with the subject plebeians and with other inferior peoples from the Near East. Decimated by war and by the decline in their birth-rate, and with their racial level lowered through intermixture, the Nordic element sank to a hopeless minority.[1] "Jews, Syrians and other Asiatics took over trade and ruled through their gold; the army was soon, for the greater part, composed of Germans and other 'barbarians,' and even the Emperor was no longer properly a Roman. In short, the Roman Empire became a soulless state-machine ruling over a chaotic mixture of peoples no longer united through the bond of blood, but only by a complex of legal rules." [2] This "law," as codified by Justinian, was lacking in "inner, inborn legal sentiment. . . . The racial deterioration has dissolved all moral ties, in place of which the external might and power of the State now alone held men together. Between morality and law there no longer existed an inner relation. As a consequence, it was deemed justifiable to pursue the universal impulse for gain. . . . It was considered clever and prudent to circumvent the laws, to slip through their meshes, and to snap one's fingers at the goddess *Justitia*." [3] In short, the Roman law was almost exclusively one of reason (*Verstand*), and not of soul (*Seele*). Not having its roots in *Volkstum* and living experience, it became a jurists' law which sought justice in the mechanical application of abstract rules. German law, on the other hand, was never enslaved by concepts and systems, but kept always in view the needs of changing life. Roman law was a command of the State, ordered from above, and, therefore, not binding upon the sovereign power. German law "sprang from the spiritual soil of the people," and, since its basis was non-volitional, was obligatory for all the members of the society, ruled and rulers alike. It was a social law (*Wirbetont*), and not individualistic and egoistic (*Ichbetont*), as was the Roman.[4]

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[1] *Die rassengesetzliche Rechtslehre*, pp. 13, 14. Also, Robert Reimer, *Hochschule für Politik der NSDAP*, 1933, p. 92.

The unique creative capacity of the Nordic, Nicolai asserts, is shown "very clearly in the history of the word '*ingenium*'; we translate it to-day as 'talent,' 'inborn spirit,' 'genius,' 'spiritual creativeness.' That, however, is not the original meaning: the word is derived from '*gens*,' which properly means that which is in the race, which is inborn. The '*ingenuus*' is one who derives from the old Nordic patrician *gentes*, in other words, a man of Nordic race, who, by virtue of his genius, possesses the creativeness and the capacity to know and to establish what is law, and who can participate in the Nordic knowledge of good and evil which is transmitted by heredity. . . . In the professional title 'engineer,' that is, 'discoverer,' the word '*ingenuus*' has retained the meaning of 'creative,' which, according to the old Nordic and German conception, is an innate capacity transmitted by Nordic blood." *Op. cit.*, p. 14.

[2] *Ibid.*, p. 26.

[3] Schmelzeisen, *op. cit.*, p. 11.

[4] Nicolai, *Die rassengesetzliche Rechtslehre*, p. 26.

[5] Rosenberg, *Das Wesensgefüge des Nationalsozialismus*, p. 10.

[6] Nicolai, *Die rassengesetzliche Rechtslehre*, pp. 3, 26.

The "Jewified, commercial world-empire" of Rome fell as the result of its lack of racial unity, but its "law" survived and finally replaced the old German law in the fifteenth and sixteenth centuries. This reception of an alien system was not entirely the product of chance, Nicolai asserts, but coincided with the disintegration of the Nordic race in Germany through intermixture with other peoples. "The prolific Jews," he says, "consciously brought our legal instruction, legislation and jurisprudence under their influence. . . . The racial crossing of the people and the influence of Jewdom not only had as a consequence the distortion and destruction of old German legal institutions, but it has also cost us the correct conception of what 'law' properly means." [5]

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[1] Nicolai, *Die rassengesetzliche Rechtslehre*, pp. 6, 7. A similar interpretation of Roman history is found in Dr. Frick's "Richtlinien für Geschichtslehrbücher," cited *supra*, in *Mein Kampf*, 317 ff., and in Rosenberg, *Das Wesensgefüge des Nationalsozialismus*, pp. 13 ff. "The great majority in Italy," Dr. Frick states, "consisted of the descendants of Oriental slaves. The hopelessness of this situation was the background for the Stoic *Weltanschauung* of the Romans." See the comments of Hermann Killer, in *Völkischer Beobachter*, August 16, 1933.

[2] Nicolai, *Die rassengesetzliche Rechtslehre*, p. 7.

[3] *Ibid.*, p. 7; Schmelzeisen, *op. cit.*, p. 18.

[4] Schmelzeisen, *op. cit.*, pp. 18–20. The Roman natural law, which, one might suppose, was not lacking in "soul," is dismissed as being based expressly on reason, and, therefore, "godless." *Ibid.*, p. 20.

[5] Nicolai, *Die rassengesetzliche Rechtslehre*, pp. 8, 9.

The worst features of the Roman system are found in the positivism of the nineteenth century, and it is against this conception of the source, validity and purpose of law that the National Socialist theoricians direct the brunt of their attack. The rise of the positivistic school, Nicolai states, was the result of the predominant influence in Germany of peoples of mixed race, and especially of Jews. The Jew lacks the clear legal conscience which is the monopoly of the racially pure. He therefore "clings to external commands, to statute, to dogma, and to the letter of the law. He does not feel what is right or correct; he must first establish it by the understanding, it must first be told him from without. The Jew, therefore, creates a legislative machine which tells him at all times what is forbidden and what is permitted. Therefore, he sees in the State or other external organization the source of law. Therefore, he worships the power that emits the commands and sees justice in their outward fulfilment."[1] The legal doctrine of positivism is mechanical, abstract, lacking in a sense of past and future, and dissevered from morality and religion.[2] During the period of its ascendancy, "Law lay in the hand of irresponsible possessors of power, who lacked all consciousness of the soul of the people and its need for justice. Aliens had, to a great extent, influence upon legislation and jurisprudence. The people lived without any sense of right and thereby, at the same time, lost in increasing measure the consciousness of law and of justice. We stood before a general decline of culture."[3] In the words of the same author, "Heaven ordained at the last hour that our spirits should awaken under the leadership of one of our greatest."[4] National Socialism has undertaken to rebuild the foundations of law and "to oppose the devastating results of the one-sided rule of reason. It emphasizes the worth of the soul, of feeling, of common sense, and of trust in God," but recognizes that a balance between soul and intelligence alone corresponds to the German spirit. In its task of legal reform it aims to produce a synthesis of these two forces. The new order must express the totality of the *Volksgeist*—its "*Ganzheit.*"[5]

Relation of State and Law.—The fundamental principles underlying National Socialist legal thought may now be clearly determined. Its basic premise of a racially conditioned law is carried to a logical conclusion in its doctrines as to the relation of State and law, of statute and custom. The denunciation of the Roman law as the mere command of an irresponsible, sovereign State may come as a surprise unless it be recalled that the "authoritarian, totalitarian" National Socialist State is justified by its defenders as having a more genuinely popular basis than the liberal-democratic regime which it supplanted.[6] Since law is the product of the social instinct, it cannot have its source in the will of the State. Law is what is " right " (*richtig*), and is not created by command. Authority can issue orders and enforce them, but it cannot make them law (*Recht*).[1] " Law," *Reichsminister der Justiz* Dr. Gürtner states, " cannot be invented or devised ; one cannot renew it in the sense that one can renew the façade of a building. For law has the force of its validity only outwardly in the authority of the legislator—that is, only in so far as the State by intervening can enforce its validity. The vital root of law, however, reaches down into the secret depths of the popular conscience and thence supplies it with its inner validity and affirmation.[2]

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[1] *Op. cit.*, p. 27.

[2] Schmelzeisen, *op. cit.*, pp. 21–3.

[3] *Ibid.*, p. 23.

[4] *Ibid.*, p. 5.

[5] *Ibid.*, p. 15.

[6] See the speech by Dr. Dietrich (*Reichspresschef der NSDAP*) at the Reichsparteitag, Nürnberg, August 31, 1933. *Völkischer Beobachter*, September 2, 1933.

The normal legal rule, therefore, is found in customary law, which is a direct expression of the legal conscience of the people. The State, as an external political organization, merely " formulates and administers the law in that it expresses in statute (*Gesetz*) what it perceives to be law (*Recht*)." [3] The function of the legislator is to " investigate the law and to establish by statute what it has found to be the living law of the people." [4] " The legislator cannot create law arbitrarily out of nothing, but can only find and form the law living in the legal conscience of the people and sanction it through the coercive power of the State. . . . Statutes are mere technical aids for the realization of the idea of law." [5] They are necessary only because the popular conscience, which leads unerringly to legally correct conclusions in fundamental and general matters, is not sufficiently " detailed " for the solution of the numerous technical, administrative and procedural questions which arise in the many-sided life of the modern State.[1]

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[1] Nicolai, *op. cit.*, pp. 9, 24 ff. See Max Rumpf, " Richter und Volksgemeinschaft," *Deutsche Juristen-Zeitung*, March 15, 1934, p. 382.

[2] " Zur Erneuerung des deutschen Rechts," *Deutsche Justiz, Rechtspflege und Rechtspolitik*, November 9, 1933, p. 622.

[3] Nicolai, *op. cit.*, p. 32.

[4] Schmelzeisen, *op. cit.*, p. 38.

" According to their inner nature, there is no opposition between statute and customary law. Both are only forms of expression of the law flowing from the spirit of the people. There exists an opposition only in their external relationship, in so far as in statute the manifestation of law proceeds from above through the legislator as the leader of the people, while (in customary law), on the other hand, it comes from below through the people itself." *Ibid.*, pp. 37, 38.

[5] Nicolai, *op. cit.*, p. 33.

On the position of the judiciary in the National Socialist State, see Richard Hoffmann (*Landgerichtspräsident*, Berlin), " Recht und Richter im neuen Staat," *Völkischer Beobachter*, July 12, 1933.

In a speech delivered on November 21, 1933, Herr Greiser, Vice-President of the Senate of Danzig, stated : " Although National-Socialism has to-day attained power, the legal position for which we National-Socialists are contending has not yet been created. Our struggle does not cease with the modification of Roman law : it can cease only when Teutonic law has taken the place of Roman law. . . . The issue of the present struggle is whether the objectivity of the judges is to remain the supreme legal consideration. . . . In the totalitarian National-Socialist State, the subjective law of the National-Socialist State must take the place of objective law, since the National-Socialist outlook is not based upon objective treatment but on subjective assent. The National-Socialist State must have National-Socialist law." *League of Nations Official Journal*, March 1934, p. 291.

From the above premises it follows that the State is subordinated to law (*Recht*) and that all its measures in violation of this law lack obligatory force. Judged by this standard, the "November Revolution" of 1918 was a breach of law in that it was contrary to the "Germanic legal idea of loyalty and honour."[2] The Republic, therefore, was based upon a usurpation of power, and its "anti-national" agreements and enactments in violation of "the principles of liberty," such as the Treaty of Versailles and the Law for the Protection of the Republic, are not legally or morally binding upon the German people.[3] The Government of the Second Reich must be viewed as a *de facto* regime, and only such of its acts are valid as have been recognized by the legitimate National Socialist Government as being in conformity with the *richtiges Recht*.[4]

Influence of Racial Theory upon National Socialist Legislation.—In any attempt to assess the actual influence of the racial theory upon National Socialist legislation, difficult questions as to cause and effect are at once encountered. The dogma of Aryan or Nordic supremacy is itself, in large part, a positive expression of the antisemitism which has characterized the National Socialist movement since its inception. Translated to the legal sphere, it is as much a rationalization of antipathy to institutions deemed contrary to the principles of National Socialism as it is a positive theory of German law. National Socialism, by definition, is the movement which formulates and expresses the German spirit in all cultural and social fields, including that of the law. Therefore, any elements of a legal system which do not accord with National Socialist views are non-German and "*volksfremd*." The "German law" of the race theoricians is National Socialist law, and everything else is condemned as "Roman" or "Jewish." The *rassengesetzliche Rechtslehre* ostensibly pursues the historical method, but no real effort is made to discover and to isolate the Germanic and Roman elements of the present legal system. Painful and exhaustive research should precede the enunciation of a theory which purports to interpret the whole of legal history. In its place, we find only sweeping and unsupported dogmatic affirmation. The *point de départ* is the National Socialist programme: what agrees with it is "German," what does not is "Jewish-Roman."[1] It is admitted that not all of the legal institutions of the primitive Germans can be transplanted to the present.[2] In practice, this would seem to mean that the "spirit" which is conceived to have dominated ancient German legal life must be made to pervade the law of the National Socialist State.[3] The solidaristic aspects of German law are emphasized, but one hears little of its no less prominent individualistic and anarchic elements—private enforcement of rights, the *Fehde*, the *Blutrache*—which would hardly consist with the National Socialist "authoritarianism" of the present. "Loyalty to the gods, to the ancestors, to one's own kind, to labour for the existence of the generation and of the *Volk*, loyalty before all to the rights, but also to the obligations which every member of the *Volk* had to fulfil in the service of the whole"—these are the watchwords of Germanic law, and, therefore, of National Socialism.[4] It would probably be more accurate to say that they are the expression of qualities with which the ancient German has been retroactively endowed. His portrait, as painted by National Socialist hands, bears obvious resemblances to that of Rousseau's "noble savage," and does as much violence to the original.

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[1] Nicolai, *op. cit.*, pp. 31, 32; Schmelzeisen, *op. cit.*, pp. 37, 38.

[2] Nicolai, *op. cit.*, pp. 34, 35.

[3] *Ibid.*, pp. 50 ff.

"War," Nicolai states (*ibid.*, p. 44), "is no arbitrary act but a legal act through which peoples settle their claims to life." War is the "chivalrous and honourable composition of a legal claim which two peoples make to life. For the Roman conception that any frontier, any settlement whatever, might have an unchanged duration of centuries, was alien to the German conception. Peoples rise and pass away; they increase and extend themselves if their vital force is unbroken; they decay and perish if their moral force does not suffice to maintain their existence and to master the future. The strong, however, has a right as against the weak; he has a claim that the weak make room for him and yield him land where he can settle and gain for his posterity a place for living. But honourable struggle decides as to strength, and Fate decides whom the victor is, whom the victor must be. Therein lies the divine justice which in the end claims the victory for the valiant and forceful. The German piously bows to the decision of Fate if the stronger opponent conquers him—if, however, the victor treats the honourably defeated foe in a chivalrous manner." *Ibid.*, p. 19.

[4] *Ibid.*, p. 53.

Whether or not there is any real historical link between Germanic and National Socialist Law, there is an evident connexion between the race theory and a number of the most important legislative acts passed during the first year of the present regime.[5] The laws providing for the exclusion of " non-Aryans " from public office [1] and from the higher professions,[2] and for restricting their attendance in the schools,[3] are justified on the ground that the development of true German *Volkstum* is possible only in a State which excludes all persons of alien blood from positions of influence and assures to the higher racial elements a predominant importance in the formation of the national life and character. So conceived, the race legislation is merely an elementary act of self-defence.[4] German life, it is said, must be reformed according to the German spirit, and it is prerequisite to the fulfilment of this task that the alien influence which has distorted and stifled it be eliminated. As a corollary to the existing legislation, it is demanded that the purity of the race be protected penally through the prohibition of all future intermixture with non-Aryan peoples.[5] This demand has been given concrete form in a proposal of the Prussian Ministry of Justice that three new offences be created: " race treason " (*Rasseverrat*), " violation of the honour of the race " (*Verletzung der Rassenehre*) and " endangering of the race " (*Rassengefährdung*).[6] It seems altogether probable that this proposal will be adopted by the committee which is now engaged in preparing the project for a new penal code of the

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[1] An example of the National Socialist tendency to "Aryanize" or "Germanize" all that it does not wish to reject as "non-Aryan" or "Jewish" is found in the following statement: "The Saviour Jesus Christ could never have been a Jew by race on account of his personality and teaching, which are Aryan-heroic through and through." Arthur Dinter, "Die Rassen- und Judenfrage im Lichte des Geistchristentums," in *Das neue Deutschland und die Judenfrage*, 1933, p. 103.

[2] Schmelzeisen, *op. cit.*, p. 33.

[3] "The struggle to-day is directed less against the remains of objective Roman law than against the spirit created by century-long preoccupation with the Roman law." *Reichsjustizkommissar* Dr. Frank; Address to the *Akademie für deutsches Recht*, December 3, 1933, quoted, *ibid.*, p. 34.

[4] Nicolai, *op. cit.*, p. 17.

[5] Points 4 and 6 of the "Programme of the N.S.D.A.P." provide that "Only one who is a *Volksgenosse* may be a citizen of the State (*Staatsbürger*). Only one who is of German blood can be a *Volksgenosse*, without reference to confession. Therefore, no Jew can be a *Volksgenosse*. . . . The right to determine the leadership and laws of the State shall belong only to citizens of the State. Therefore, we demand that every public office, of whatever kind and whether it be in *Reich*, *Land* or *Gemeinde*, be filled only by citizens of the State."

See *Reichsminister* Dr. Frick, "Die Rassenfrage in der deutschen Gesetzgebung," *Deutsche Juristen-Zeitung*, January 1, 1934, pp. 1–6.

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[1] By the " Gesetz zur Wiederherstellung des Berufbeamtentums vom 7, April 1933 " (*Reichsgesetzblatt*, I, 175, §3), it is provided that officials not of " Aryan derivation " are to be retired. A person " is not deemed to be an Aryan if he is descended from non-Aryan, and especially Jewish, parents or grandparents. It suffices if one parent or grandparent is non-Aryan. This is especially to be assumed if one parent or grandparent has belonged to the Jewish religion." " Erste Verordnung zur Durchführung des Gesetzes zur Wiederherstellung des Berufbeamtentums vom 11, April 1933 " (*RGBl.* I, 195, § 3). A person who is non-Aryan or who is married to a non-Aryan may not be called to public office under the Reich, and any person marrying a non-Aryan is to be dismissed. " Gesetz zur Änderung von Vorschriften auf dem Gebiete des allgemeinen Beamten-, des Besoldungs- und des Versorgungsgesetz vom 30, Juni 1933 " (*RGBl.* I, 433).

[2] See, for example, the " Gesetz über die Zulassung zur Rechtsanwaltschaft vom 7, April 1933 " (*RGBl.* I, §§ 1, (2), and " Gesetz betr. die Zulassung zur Patentanwaltschaft und zur Rechtsanwaltschaft vom 22, April 1933 " (*RGBl.* I, 217, § 1).

[3] " Gesetz gegen die Uberfullung deutscher Schulen und Hochschulen vom 25, April 1933 " (*RGBl.* I, 225, § 4).

See also the " Gesetz über Widerruf von Einbürgerungen und die Aberkennung der deutschen Staatsangehörigkeit " vom 17, Juli 1933 (*RGBl.* I, 480, §§ 1, 2), which provides for the revocation of all naturalizations effected between November 9, 1918 and January 30, 1933 which are deemed not to be " desirable," and for the forfeiture of the nationality of German citizens who injure German interests through their conduct abroad. These provisions have been applied almost exclusively to Jews.

[4] See, for example, the statement of *Reichminister* Dr. Frick, quoted in the *Jüdische Rundschau*, December 8, 1933.

[5] For example, in Hitler, *Mein Kampf*, p. 445 ; Ernst von Heydebrand und der Lasa, *Deutsche Rechtserneuerung aus dem Geiste des Nationalsozialismus*, 1933, 29 ff. ; Nicolai, *op. cit.*, pp. 45, 46 ; Schmelzeisen, *op. cit.*, pp. 25, 26.

[6] *Nationalsozialistisches Strafrecht : Denkschrift des preussischen Justizministers*, 1933, pp. 47–9.

Reich.[1] It would be the logical completion of the policy expressed in legislation already in force.

Conclusion.—A detailed criticism of the theory of law above described does not fall within the scope of the present article, and, to a student of legal history, might seem a work of supererogation. No useful purpose is to be gained by an attempt at refutation of a conception founded upon dogmas which are accepted as articles of faith, for the extreme racial determinist not only " feels " his law, but his race as well.[2] The *rassengesetzliche Rechtslehre,* as expounded by Dr. Nicolai, is obviously a propagandist doctrine in which full advantage is taken of the emotional values contained in the appeal to race, tradition and the primitive antipathy to the alien. It is but another illustration of the uniform tendency of propagandist movements to paint everything in black and white, without intervening shades. A National Socialist disquisition upon the virtues and benefits of the present regime is inevitably accompanied by a denunciation of the incredible weakness and the abysmal corruption of its predecessor. A parallel method is followed in the discussion herein described. It differs only in that the " Jewish communist " or " Jewish democrat " has been replaced, as the villain of the drama, by the " Jewish-Roman " jurist. The doctrine that law must be suited to the national characteristics of a people is valid beyond dispute. In its National Socialist formulation it is no more sound than the dogma of exclusive racial determinism upon which it is based.

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[1] For the composition of the committee, see the " Amtliche Bekanntmachung des Reichsjustizministers (Dr. Franz Gürtner), *Deutsche Justiz*, November 9, 1933, p. 622.

On the question of the dissolution of mixed marriages between Aryans and Jews, see Heinrich Stoll, " Die Auflösungeiner Mischehe," *Deutsche Juristen-Zeitung*, May 1, 1934, pp. 561–70.

[2] Thus one writer has stated : " The extent to which the science of race has already caught up to the actuality and significance of race, is not a decisive question. Race reveals itself as might operating through an order of life, through behaviour, intention and history—which is disclosed through instinct, vital feeling, evident fact and the immediate experience of life. . . ." Ernst Krieck, *Nationalpolitische Erziehung* (7, u. 8 Aufl., 1933), p. 27.

THE LIABILITY FOR DEBTS OF THE FORMER GERMAN PROTECTORATES IN AFRICA CONSIDERED IN THE LIGHT OF DECISIONS OF THE GERMAN SUPREME COURT.

[*Contributed by* DR. F. A. MANN, *German Law Counsellor in London.*]

Leading Cases.—It is one of the consequences of the Treaty of Versailles that the German courts have had on many occasions to decide questions relating to Public International Law, the Law of Currency and International Private Law which are of interest beyond the German frontiers. To the English lawyer the decisions dealing with the former German Protectorates in Africa may, in particular, be a matter of interest.

The leading cases are five decisions of the German Supreme Court (*Reichsgericht*) founded on the following facts :

1. *RGZ* 105, 260 [1]: The plaintiff had leased real property in Dar es Salaam to the administrative authorities in German East Africa and now sues the defendant, the German Empire (*Reich*), for the rent apportioned for the period from October 1916 to April 1920.

2. *RGZ* 108, 298 : In the spring of 1917 the plaintiff, an officer of the colonial force in German East Africa, deposited 4,000 rupees at the district's pay office. He claims from the German Empire payment of 3,000 rupees.

3. *RGZ* 113, 281 : On November 16, 1914, the plaintiff, against whom criminal proceedings were pending, had deposited 10,000 marks as bail with the Imperial District Court at Windhoek. He claims repayment of this sum from the German Empire.

4. *RGZ* 131, 41 : In Luederitzbucht, in December 1911, the plaintiff had given a loan of 10,000 marks to the defendant. The plaintiff, having returned to South-west Africa in 1925, claims from the defendant, who since 1919 was living in Germany, the repayment of the loan.

5. *RGZ* 137, 1 : The plaintiffs are holders of bonds issued by way of a public loan by the German Treasury for the German colonies in 1908, 1909 and 1913. The certificates, issued in the German standard currency, were endorsed : " Issued for the German Colonies East Africa Cameroons, German South-west Africa, interest and repayment guaranteed (*unter Buergschaft*) by the German Empire." The plaintiffs claim from the German Empire as guarantor repayment and revalorization of the bonds in their possession.

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[1] *RGZ* is the usual abbreviation for : *Entscheidungen des Reichsgerichts in Zivilsachen* (Official Reports on Civil Law Cases of the Supreme Court).

Consideration of the facts of these cases makes it obvious that there are three groups of problems to be considered. The following questions arise : (i) whether and how far the German Empire is liable for the debts of the former German Protectorates ; (ii) whether and how far the states which succeeded the former Protectorates in one way or another (successors of the Protectorates themselves, Mandatory Powers, etc.) are liable for the obligations of the former German Territories [1] ; and (iii) if liability be established, on what basis must the amounts, originally owed, be converted into currencies now in use.

It may be stated at once that the German Supreme Court in all cases based its decision, partly expressly, partly impliedly, upon the application of German law.

Liability of German Empire.—With regard to the question whether and how far the German Empire is liable for the obligations of the former German Protectorates, the Supreme Court proceeds on the basis accepted in Germany that the Protectorates—whether they be looked upon as " appurtenances " of the State (this is the general doctrine followed by *RGZ* 137, 1, 2) or not—have been recognized as capable of enjoying the rights and incurring the liabilities of property. This deduction follows clearly from the Act of March 30, 1892, concerning the receipts and expenses of the Protectorates of which s. 5 provides that " for the liabilities caused by the administration of a colony " only the property of the colony itself is liable. S. 4 of the Act recognizes joint rights on the part of the colonies in issuing public loans and provides that every Protectorate concerned is liable for interest and repayment as joint debtor. On the other hand, the different Protectorates in their relation to each other are liable according to the amount of the loan apportioned to each Protectorate. Thus the Protectorates are able to take obligations upon themselves without any assistance from the Empire.

The question whether the German Empire is liable for the obligations of the Protectorates which have been recognized as undertaken by such Protectorates has been answered by the Supreme Court in *RGZ* 105, 260, in the affirmative without any reservation whatever. In the first place *RGZ* 105, 260, refers to Art. 119 of the Treaty of Versailles under which Germany abandoned her oversea possessions, and to Art. 120 of the same Treaty according to which the whole personal and real property of the German Empire or any German State in these territories passes to the Government administering the territory. The judgment of the Supreme Court proceeds as follows :

> As soon as the Treaty of Versailles came into force the former Protectorate of German East Africa ceased to exist in its old form as a German Protectorate. It has passed to a foreign power (England) with all its prerogatives, its territories, states and every other right situated in its territory or

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[1] This question had to be answered in case No. 5, since a liability of the German Empire as guarantor could under German law arise only in case the principal debtor were still in existence and itself liable.

connected with it. The decisive reasons for its legal existence and for its abstract unity by which alone it was enabled to be an independent formation have disappeared. According to the general maxims of the law the obligations of the Protectorates, based on private law, would also have passed to the annexing state (England) together with the territory.[1] But the Treaty of Versailles expressly refused to recognize this doctrine. According to it the property of the colonies which was formerly regarded as a single whole was split up and its unity dissolved. The property already specified has passed to England; what is left over—the rights remaining under German control, estates situated in Germany, goods and chattels, claims, especially all the debts—all such property no longer appertains to German East Africa, which has ceased to exist as a legal person. But it by no means follows that the assets of the former Protectorates are now ownerless, that the debtors are released as there is no creditor, or that the claims of the Protectorates' creditors in the absence of a debtor are void. Such a deduction would be irreconcilable with the demands of a constitutional State; it would be no less irreconcilable with the tutelary power of the defendant, the German Empire. This power includes the duty of responsibility for due settlement of the affairs of the former Colonies. As far as this duty is concerned, the tutelary power has continued and has been of late legally recognized in the proclamations of March 21 and November 7, 1919,[2] whereby the privilege of the former Emperor was transferred to the *Reich* after the dethronement of the Emperor. This duty made the *Reich* fully qualified to take over the winding up and liquidation as its own prerogative instead of installing a liquidator whose duty it would have been to make an application for the opening of bankruptcy proceedings against the former colonies.[3] Therefore the *Reich's* activity as liquidator had not only a " merely technical character," as the judge of the Appeal Court says as an *obiter dictum*, nor did it only consist in providing officials and the necessary machinery which incidentally could again only have been done at the expense of the *Reich*. On the contrary the matter here in question is the performance of a legal duty of the *Reich* based on its tutelary power. To perform this duty the *Reich*, on its own behalf and its responsibility, was liable for the obligations which arose from its activity as liquidator. But beyond this it must be taken for granted that the *Reich* is furthermore liable in respect of its own property for the obligations of the Protectorates previously incurred.

The defendant, the *Reich*, and with it the Court of Appeal, do not recognize any legal basis for this liability. Nevertheless the arguments of the appellant against this decision of the Court of Appeal must be accepted as to the main position. The legal basis has to be found in the general attitude of the *Reich* towards the Protectorates now to be considered. From the moment the Empire acquired the overseas territories (later on called colonies) by occupation or treaty and made them part of its legal entity in Public International and Constitutional Law, the control and, therewith, the representation of those territories in financial matters appertained to it. . . . However, in the course of time a separation of its own financial administration and system of accounts from that of the colonies, as well as from the accounts of the individual colonies in relation to each other, seemed naturally desirable to the

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[1] Cf. *RGZ* 16, 265.

[2] *RGBl.* pp. 327 and 1875.

[3] Cf. German Civil Code, ss. 47 ff.

Empire. This purpose was answered by the Statute of March 30, 1892. The appellant, however, indicated that in the beginning the Statute had more " the character of a programme " and that at first even while it was in force, and for a considerable space of time afterwards, the Exchequer of the *Reich* had to supply the money to the colonies for which the colonies kept their own accounts. These facts prove that that Statute and the constitutional independence founded on it have been to a certain extent artificial creations. The inner connexion between the Empire and the colonies has, even by the Statute of 1892, not been completely destroyed, but only disguised. This general view sufficiently justifies the assumption that on principle this liability is only formally excluded by the special provisions of the Statute of 1892, and that behind the notional financial independence of the colonies—although not necessarily in the legal form of subsidiary liability—the liability of the Empire has persisted. In view of these facts, and seeing that in consequence of the Treaty of Versailles the German colonies as such have disappeared and their territories been occupied by other Powers, the decision of this Court must be based on this liability, notionally existing, which in the first place has only been excluded or restricted by statute as a result of the autonomy of the individual colonial administrations, but which at the same time must be considered as a necessarily and logically existing conception of the law and which therefore from the legal point of view must also be recognized.

The court, however, did not abide by the opinion which it thus expressed in a general form. The decision *RGZ* 108, 298, it is true, accords with the earlier decision so far as its results and its arguments are concerned. But a decisive change was made in a third decision, *RGZ* 113, 281. It states in the first place that the liability rising from the bail is an " administrative debt " of the colony which is to be construed under s. 5 of the Act of March 30, 1892, mentioned above : " For the liabilities caused by the administration of a colony only the property of the colony itself is liable." This legal situation, it furthermore deduces, has not been changed by the Treaty of Versailles, Art. 257, which merely states that neither the colonies themselves nor the Mandatory Powers under whose administration they should fall should be charged with any portion of the debt of the *Reich* or German States, without stating anything as to the debts of the colonies themselves.

The contrast between this and the earlier decisions has been adjusted by a method which is frequently applied by the Supreme Court : it mentions that the Chamber, which has given judgment in *RGZ* 105, 260, does not adhere to the opinion expressed therein and that *RGZ* 108, 298, must be interpreted as meaning that the German Empire is liable only for those administrative debts " which are caused by warfare." This latter differentiation, however, was not decisive in *RGZ* 108, 298—though it is mentioned but in a different connexion, which will be discussed later on—and it could not be decisive, because according to the actual facts the decision is not concerned with a debt resulting from warfare, so that the Supreme Court, even if it had in mind to make such a differentiation, could not have decided against the German Empire.

It follows that according to recent German decisions the German Empire is not liable for administrative debts incurred in time of peace, while it is not beyond doubt whether it is liable for debts resulting from warfare, there being no decision based on this differentiation. As to other kinds of colonial debts, the Supreme Court has not expressed an opinion.

Liability of Successor States.—With regard to the second question, the law was first formulated in *RGZ* 105, 260. It lays down, as appears from the passage quoted above, that according to general legal maxims " the obligations of the Protectorates, based on Private Law, would have passed to the annexing state (England) together with the Territory," but that the Treaty of Versailles has explicitly declined to admit this deduction.

The Supreme Court has applied these " general legal maxims " not only in the early decision *RGZ* 16, 265, and in *RGZ* 105, 260, but also in other decisions dealing with the former German colonies. In *RGZ* 113, 281 (286), it says as an *obiter dictum* that though the former German colonies in South-west Africa are, according to Art. 22 of the Treaty of Versailles, under the tutelary power (Mandatory administration) of the Union of South Africa, they should still be regarded as subjects of rights and liabilities and therefore as still debtors.

The most important decision in this connexion is, however, *RGZ* 137, 1 (4, 5). It is there stated that since by Art. 257 of the Treaty of Versailles all property and possession belonging to the German Empire or to the German States, situated in the former colonies, are transferred with the territories to the Mandatory Power in its capacity as such, and since no payment is to be made nor any credit given to those governments in consideration of this transfer, " according to the rules of international law the consequence would be that all debts incurred to the debit of the colonies have remained territorial debts." And furthermore: " The colonies have not ceased either to exist as persons capable of enjoying the rights and incurring the liabilities of property. This cannot be derived from the Treaty of Versailles. For with the coming into force of that Treaty the former colonies have only ceased to exist in their hitherto prevailing form of German colonies. Their legal personality has not ceased to exist because they have come under the administration of foreign mandatory powers. The colonies have only ceased to be independent creatures of German law."

The colonies, therefore, are themselves liable for the debts incurred by the former German colonies: *RGZ* 113, 281 (German East Africa), *RGZ* 137, 1 (German East Africa, Cameroons, German West Africa). On the other hand, the general principles according to *RGZ* 105, 260, tend towards the liability of England for the debts of German East Africa as a result of the Tanganyika Act.

It is only right to draw the attention of the reader to two other decisions (*RGZ* 136, 339, and 141, 290) which concern former German territories now belonging to Poland and to Czechoslovakia, which again make it obvious that the meaning of these " general maxims " is, even according to the Supreme Court, not beyond doubt.

The answer to the question whether this result which is based on general principles is altered by international treaties is in the negative according to all the decisions except *RGZ* 105, 260. *RGZ* 108, 298, stresses the fact that, at least so far as concerns the debts connected with the warfare of the colonies, the transferee cannot be liable, but does not solve the question of his liability for the other debts. *RGZ* 113, 285, admits that the Treaty of Versailles might have averted this result, but the decision continues: " Art. 257 restricts itself to the decision that neither the territories themselves nor the Mandatory Powers who would be the administrators should be charged with any portion of the debt of the German Empire or States. This does not decide the question of the liability for the debts of the colonies themselves. A wide interpretation of Art. 257, par. 1, is out of question."

RGZ 137, 1 (5), is the chief source for this doctrine:

> . . . As to the text of this article the contents of the English version are not in accordance with that of the French version. Whereas the English version mentions " any portion of the debt of the German Empire or States," the French version says "*aucune partie de Service de la Dette de l'empire ou des états allemands*," *i.e.* the debt service of Germany or the German States. That neither version comprises the debts of the colonies themselves as independent legal subjects needs no further explanation. Nor is it possible to differentiate between local administrative debts and so-called financial debts (loans), as the latter were issued on the account of the colonies, that is to say that regarding the primary liability they are neither debts of the *Reich* nor are they to be settled by its debt service. The Court of Appeal objects to this on the grounds that the German Empire did not float any loans for the colonies in its own name and that, therefore, Art. 257 could not refer to the loans of the *Reich*. This opinion is wrong, as according to s. 4a of the Statutes of March 30, 1892, and May 18, 1908, the Chancellor has been authorized to provide by way of credit the means which would be necessary to comply with the extraordinary needs of the colonies. Several times such loans have been put at the disposal of the colonies out of the resources of the public loans of the Empire and had not been repaid in 1914. The German peace delegation, in its memorandum of May 29, 1919, demanded that the territories which had to be given up should remain themselves liable for the debts incurred by them and that the transferee should compensate the *Reich* for all expenses made in favour of the colonies and their administration. The Allied Powers replied, in their memorandum of June 16, 1919, as follows:
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> " *Elles ne sont pas d'avis que les colonies doivent supporter une partie quelconque de la Dette Allemande ni rester débitrices envers l'Allemagne des dépenses faites par l'administration impériale du Protectorat. Elles estiment en effet qu'il serait injuste de faire peser sur les indigènes la charge de ces dépenses, qui paraissent avoir été faites surtout dans l'interêt de l'Allemagne, et non moins injuste d'en faire assumer la responsabilité par les puissances mandataires, qui étant constituées fidéicommissaires par la Société des Nations ne tireront aucun bénéfice de ce fidéicommis.*"

Accordingly, the allied governments declined to take upon themselves the local administrative debts either for the colonies themselves or for the mandatory powers. Yet the Court of Appeal is right in presuming that this attitude has not been expressed in Art. 257 and therefore has not become German law. The same applies to the public loans of the colonies. Neither this memorandum of the Allied Powers nor Art. 257 makes it clear that these liabilities of the colonies were not to be taken over. Neither can the memorandum be applied to the public loans of the colonies themselves, because the *Reich* has in the opinion of the Court of Appeal not floated any loans for the colonies. For it may mean that the colonies—as opposed to the other Powers to whom German territories were transferred, and who, according to Art. 254 of the Treaty of Versailles, took over part of the debts of the *Reich* as it was on August 1, 1914—did not want to take over any part of the *Dette Allemande, i.e.* the debts of the *Reich,* and therefore still less any part of those public loans out of which the *Reich* had given loans to the colonies in their own interest. It would not matter if the Allied Powers erroneously thought that the *Reich* and not the colonies themselves was exclusively or primarily liable for the public loans of the colonies. According to the decisions of this Chamber it has been recognized that the interpretation of the Treaty of Versailles is dependent on what both parties unanimously intended by a certain clause, and this can only be arrived at by its objective sense. The onus of doubt arising out of the interpretation falls upon the party responsible for the version. As Germany is not responsible for the version of Art. 257, and as it is at least open to such doubt, it cannot be recognized that by this Article the primary liability of the colonies for their public loans of 1908, 1909 and 1913 has been eliminated.

But according to this decision of the German Supreme Court neither has the liability of the Protectorates been extinguished by the Hague Convention of January 20, 1930. This Convention provides[1] that Germany renounces all claims to the loans issued by the former German Protectorates. The German memorandum on this Convention states that not Germany but the Territories are liable for the debts, but that the Mandatory Powers declined any liability. Although the Supreme Court admits that it is at least doubtful whether the Hague Convention did not exclude the liability of the Territories, it comes to the contrary conclusion: according to it a literal interpretation of the Convention makes it clear that the *Reich* only renounced claims arising out of Public International Law against the subscribers to the Convention, but that the Convention by no means affected the claims of the bondholders based on Private Law who are not necessarily German subjects, seeing that these claims are not dealt with and could not be dealt with by the Convention.

The immediate practical results of these decisions has been to lead to a certain activity on the part of the German creditors of the former German colonies. The decision *RGZ* 137, 1, has arrived at the conclusion that the guarantee of the *Reich* for the public loans of the colonies still exists and that this debt of the *Reich* was to be revalorized according to the German Revalorization Act. To regulate the amount of this revalorization

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[1] Art. III.B. a.

Germany has enacted a statute of June 23, 1933, on the revalorization of the guarantee debt of the German Empire for the public loans of the colonies. According to s. 1 thereof the guarantee is revalorized so that Germany has to pay on July 1, 1938, the amount equivalent to 12½ per cent. of the public loan. According to s. 2 this payment will be reduced by any amount that is paid by the primary debtor or a third party if this amount is paid before the payment by the *Reich*. In Berlin a federation for the protection of the interests of holders of colonial loans has been established for the purpose of preserving the claims of the owners of the German Bonds "against the present Mandatory Governments of the German colonies in Africa, who are to be considered as the primary debtors in respect of these loans."

Mode of Payment.—The question in what way the debts incurred by or in the former German colonies are to be paid according to German law is governed by the principle of German Private International Law which has been frequently applied by the Supreme Court [1]: once a legal relation has been created subject to the provisions of a certain law this law remains authoritative unless both parties submit themselves to the law which is afterwards introduced at the place where the stipulated obligations were to be fulfilled, or unless both parties are subject to the new law.

From this point of view a debtor was allowed to repay a debt owed in rupees which he had incurred in Dar es Salaam under German law according to the provisions of the German law dealing with the repayment of debts in a foreign currency. It was held to be irrelevant that in compliance with the rules established by the English in German East Africa rupee notes were to be paid back in silver rupees at a fixed rate.[2] In the same way in the case *RGZ* 131, 41, summarized above, the Supreme Court refused to consider the rate of exchange given by the Debts Settlement Proclamation of December 15, 1920. Instead it applied German revalorization law which established a revalorization of 25 per cent. of the amount to be paid in gold marks. Finally, the question of loans was decided [3]: the claims against the former German colonies are to be revalorized in accordance with s. 63 of the German Revalorization Act without any discrimination among the different creditors. This means that the borrower has to pay a sum the amount of which is to be calculated in accordance with the equities of the particular case,[4] but which must not exceed 25 per cent. of the value in gold marks.[5]

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[1] Cf. *RGZ* 137, 76, 81. [2] *RGZ* 107, 121; 108, 298, 303. [3] *RGZ* 137, 1.

[4] Cf. Revalorization Act, s. 62, German Civil Code, s. 242.

[5] Revalorization Act, s. 63.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Status of the Union of South Africa.—The genesis of the important legislation passed in the late session of the Union Parliament may be traced to the assurances given by General Hertzog in February last to the Cape Nationalist Head Committee in his endeavour to secure unanimity within the Nationalist party. From his correspondence with Mr. Erasmus it appeared that it was his intention to secure legislation to bring the position of the Union into harmony with its status of independence as understood by General Hertzog and the Head Committee. Their agreement extended to the doctrines of (1) the divisibility of the Crown as regards the Union; (2) the right of Union neutrality in the case of a war declared by the Crown on the advice of British ministers; and (3) the right of the Union to separate from the Commonwealth. It is clear that from these propositions General Hertzog has never swerved, and it is natural to find them implied in the Union legislation promoted to effect his purpose. On the other hand must be set the fact that General Smuts' attitude has been that the legislation in question does no more than declare the status already achieved by the Union, and that in the past General Smuts has been inclined to deny that the Union can legally be neutral in a British war or can legally separate from the Commonwealth by unilateral action. It is obvious that legislation accepted by men holding such different views must tend to be vague, and it is significant that the critics who offered amendments to clarify the sense of the measures found themselves unable to secure any changes of substance.[1] Moreover, the silence of General Hertzog during the passage of the measures through Parliament, and the extreme care with which members of the government expressed their views, render interpretation of the legislation especially difficult. But the essential point is that the measures are an integral part of an understanding which has resulted in the creation of a fusion between most elements of the Nationalist and South African parties in the Union, which, it is hoped, may put an end to divisions based on racial lines. The fusion, however, is not complete. There remains a section of the Nationalists whose devotion to republicanism is not satisfied with the right expressly conceded to members of the fusion to hold and advocate republican doctrines, and a small section of the South African party holds that it cannot accept a position of independence as laid down by the legislation as a satisfactory substitute for autonomy as an integral part of the Commonwealth.

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[1] See *Status of the Union Act*, 1934, by C. F. Stallard, C. W. A. Coulter and J. S. Marwick, the leaders of the opposition to certain sections of the measure.

The Status of the Union Act.—This measure in the first place asserts that the status of the Dominions enunciated by the Imperial Conference of 1926 is that of a sovereign independent state, and General Smuts in discussing the measure has argued that this follows from the fact that the Conference of 1926 placed the Union on the footing of equality with the United Kingdom, which clearly is sovereign and independent. The argument, however, is not quite conclusive, for the Conference deliberately refrained from using the term independence, and it may well be held that in 1926 the Conference would have regarded the whole Commonwealth as a sovereign independent state, but would have denied that style to any part thereof taken by itself. Far more important is the fact that the sovereign legislative power is declared to be vested in the Union Parliament alone, and in accordance with this doctrine the appropriate parts of the Statute of Westminster, 1931, are re-enacted as Union Law. This step repairs an error made when the Statute was first accepted by the Union, for whereas Australia, New Zealand and Newfoundland insisted on the statute being inapplicable to them save in so far as it was rendered applicable by their own legislation, Canada, the Union and the Free State made no such stipulation. In one point the Union adds to the Statute. It will not suffice to give effect in the Union to an imperial Act that it recites that the Dominion has requested and assented to the enactment : it must also be brought into force by a Union Act. This is a consistent expression of legislative sovereignty, and will be completed by the formal re-enactment of the South Africa Act, 1909, as a Union Act, despite the incongruities inherent in such action. In precisely the same way the executive power in respect of the Union is vested in the King acting on the advice of his ministers of state for the Union, excluding absolutely any action on advice of British ministers. Further, in accordance with this principle provision is made for the disappearance of disallowance of Union Acts, since such disallowance is clearly under the South Africa Act, 1909, the privilege of British ministers. The Governor-General, however, is still permitted to refuse assent to a Bill ; the power is anomalous, for his refusal must be advised by ministers, but it must be remembered that it is a power which might conceivably be employed in the United Kingdom in exceptional circumstances,[1] and thus may pass without serious criticism. Further, it accords with the position established in the Irish Free State, for the present form of the Constitution of the State goes no further than providing for the presentation of a measure for the assent of the Governor-General,[2] and does not actually purport to compel assent. Finally, the status of the Union is asserted by providing that Union nationality shall be necessary for membership of Parliament, as it has already been made necessary for possession of the franchise. It is interesting to note that the

[1] Ridges, *Const. Law of England* (ed. Keith), p. 103.

[2] Act No. 41 of 1933.

Union official doctrine distinguishes absolutely between nationality and the common status denoted by the term British subject. It is, of course, contrary to normal British usage where British nationality is essentially connected with the status of a British subject. It is, however, desired in the Union to meet the argument of the leader of the opposition to fusion, Dr. Malan, who regards double nationality as a fatal obstacle to the creation of a unified South African people.

The Royal Executive Functions and Seals Act.—The Status Act is incomplete if the provisions therein contained are not supplemented by the measure dealing with the mode of execution of the functions of the King. The vital point in this Act is the power which it affords to the Governor-General to exercise any royal function in respect either of internal or external affairs on the advice of the ministry without obtaining royal approval. It might have been expected that the discretion whether he should act in any matter without such approval might have been given to the Governor-General personally, but that idea has been definitely negatived, and it lies with the ministry to dispense, when it thinks fit, with personal action by the Crown. As the Status Act grants all executive power to the Crown or the Governor-General, the result is that in strict law there seems no obstacle to the Governor-General issuing a proclamation of neutrality in the event of the Crown declaring war on the advice of British ministers. There seems further no obstacle to the Governor-General assenting to an Act which would sever the connexion between the Union and the Crown. General Hertzog, therefore, may claim that the measure does provide a legal means for the assertion of the doctrines of the rights of neutrality and secession. He has in fact stressed the right of neutrality and has at last faced[1] the problem of the position of the British navy at Simonstown in the event of war in which the Union was neutral. The arrangement as to that base having been made prior to any war, he contends, no exception could be taken by a foreign power to the Union claiming the rights of a neutral, while permitting the British navy to continue to enjoy the use of the naval base. It may be feared that this doctrine reflects a false view of international law,[2] and obviously no foreign power which thought it desirable to ignore the Union claim of neutrality would be willing to accept the Union argument. These issues are, however, really outside the sphere of immediate reality, and are of importance only because a section of Union opinion regards them as of high consequence. In the main the Act merely adopts by legislation what has long been by usage the rule in the Irish Free State. What is novel is the claim to ascribe to the Governor-General the exercise of external prerogatives, for the Free State proceeded by way of establishing direct relations with the King and has refrained from attempting to ascribe authority in external matters to the Governor-General, thus evincing a very different conception of the functions of that office.

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[1] Speech at Smithfield, September 7, 1934.

[2] The parallel with Spain's position relative to Gibraltar ignores the common Crown, and suggests that neutrality would mean secession. Cf. Hall, *International Law* (ed. Higgins), pp. 723 ff.

The Position of the Governor-General.—To the Union the Governor-General appears in the light of the representative of the Crown, a dignified element in the governmental machinery. In the Free State the Governor-General is an excrescence who has been reduced to the one function of signing Bills, and has been deprived even of the formal right to receive foreign envoys on behalf of the King, while the constitutional provision for adequate payments to secure his dignity has been evaded by his repaying to the State four-fifths of his salary and reducing to a nominal sum his allowances.[1] In either case, however, it must be noted that the Governor-General is virtually the servant of the ministry. His appointment and removal are in the hands of the government of the day, and this fact deprives him of all real freedom of action. It is true that to conciliate opponents the Status Act preserves the power of the Governor-General in respect of the appointment and dismissal of ministers and the dissolution and summoning of the Parliament, but the fact that any government can provide itself with a Governor-General of its own party complexion renders these formal powers meaningless. It is noteworthy that a proposal to allow the King to act independently in the matter of the selection of the Governor-General was deliberately negatived. Yet, if the Governor-General is a nominee of the local government and holds office at its pleasure, he departs vitally from the British parallel, and the constitution ceases to provide any control over the majority party in the lower house for the time being.

The Position of the Provinces.—This lack of control of any kind has been felt in the Union, especially by supporters of provincial rights. In order to win over feeling in Natal, where a demand for secession or a federalization of the constitution has become vocal, the Union Parliament has passed the South Africa Act Amendment Act, 1934, which provides that no province shall be abolished, have its powers abridged or its boundaries altered, except on the petition of the provincial council. The measure, of course, is without legal value, because no sovereign legislature can bind its successors, but the enactment is intended to place the provinces in a position similar to that affecting the vital issues of equality of languages and the Cape native franchise. All of these could be swept away by the Parliament by simple legislation, but it is to be deemed a matter of principle that they should be preserved intact. How far their lack of legal security will affect their maintenance must remain to be seen. But the only method of legal safeguarding disappeared with the passing of the Statute of Westminster and the deliberate omission thence of any control over the Union constitution.

The Status of the Protectorates and Basutoland.—The Status Act does not apply to the provisions of the sections of the South Africa Act (ss. 150, 151) dealing with the admission of fresh areas to the Union, but this saving was not inserted in the Royal Executive Functions and Seals Act, leaving it open as a mere matter of theory to argue that under s. 7 of that measure the Governor-General in Council might exercise the power of the King in Council under the South Africa Act, s. 151, to transfer the protectorates of Bechuanaland and Swaziland and the colony of Basutoland to the control of the Union. Needless to say, this result was not intended, though, had it been meant, it is clear that the question must have been open to discussion in the House of Commons which cannot be expected to remain indifferent to Union legislation affecting its own legislation.[1] But, apart from this technical point, the attainment of sovereign status by the Union affects seriously the schedule of the South Africa Act, which provides for the manner in which power of control of the territories should be exercised on transfer. When the terms were settled, it was still possible for the Crown to exercise control over Union legislation, and assent could have been refused to changes in the terms provided. Now that possibility is gone, it is clear that transfer on the terms of the schedule would provide no protection for native interests, since the terms would have no overriding force. It is therefore natural that it has been demanded by those interested in the position of the natives that transfer should not take place without the general assent of the natives and the express approval of Parliament. The British government has duly promised to take into account native wishes, and to consult Parliament. Clearly, if transfer were to take place, it would have to be made conditional on acceptance by the Union of such conditions as the British government deemed essential, and on agreement on reference to arbitration by an inter-imperial tribunal of any difference of opinion arising as to the carrying out of the terms of transfer.

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[1] See Mr. de Valera, Dáil Eireann, June 20, 1934.

The Colonial Stocks Act, 1934.—Another issue which has been raised as a result of the Status Act is the provision to be made to secure the interests of those who have invested in Union trustee stocks under the existing rule permitting disallowance of legislation in the Union interfering improperly with the rights of stockholders. Admittedly the power of disallowance was difficult to exercise and inconsistent with Dominion status, but the Dominions other than the Union do not at present desire variation of the *status quo*. In the case of the Union it might have been hoped [2] that agreement would have been achieved to refer any difference of view as to legislation to an inter-imperial tribunal, but this plan has not secured acceptance. In lieu, instead of the power to disallow, the Union government accepts the obligation of obtaining British assent to legislation, and, where such assent has not been obtained, of altering any legislation to which the British government takes exception. The solution seems most imperfect, for obviously it would be most invidious, if the Union Parliament had passed legislation at the request of the government, for that government to have to bring down a Bill to amend such legislation on the score that the British government had made the request. Virtually the new arrangement in the case of a real difference of opinion in which the Union government felt itself in the right would mean the abandonment of the British objection. But the episode is remarkably characteristic of the strong objection which seems to exist on the part of every Commonwealth government to bring into operation the procedure contemplated in respect of disputes by the Imperial Conference of 1930. Yet the arguments in favour of permanent machinery for deciding inter-imperial justiciable issues appear to be overwhelming in weight and approved themselves to the unofficial Conference on Commonwealth Relations in 1933.[1]

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[1] Cf. Sir Stafford Cripps, Commons Debates, May 7, 1934.

[2] See Keith, *The Times*, July 7, 1934; Sir S. Cripps, Commons Debates, July 11, 1934.

The Constitution of Malta.—It is not surprising that the suspension[2] of the Maltese constitution should have been followed by a careful examination of the vital question of the position of the Italian language in the law courts, and by the decision made effective by fresh Letters Patent of August 16, 1934, to terminate the rule that the language of the courts is essentially Italian. The substitution of Maltese with due provision for the case of those whose speech is English or Italian is unquestionably a very striking measure, and it is easy to understand and even to sympathize with the feeling evoked in certain circles in the island and expressed with little regard to British susceptibilities in the Italian press. But the essential fact is that, despite its prolonged opportunities of becoming the standard island speech, Italian has never become the speech of the people, who have clung to their dialect, and that there has been involved the absurdity of the use as the official speech of the courts of a language which is a closed book to the vast majority of defendants and litigants. The new step will, it is hoped, only be the precursor of many other measures requisite to bring the standard of the administration of justice in Malta up to the level attained in the more important of the colonies under Crown control.

The Upper House in New South Wales.—It seems unfortunate that it should have been thought necessary to litigate once more[3] the question of the new legislation affecting the Legislative Council of New South Wales. The points which were raised against the validity of the measure constituting the new Upper Chamber were essentially unconvincing, and, had they been held valid, would have very narrowly restricted the legislative authority of the State Parliament. It is difficult to take seriously the argument that to make the electorate for the Council consist of the members of the two houses and to allow them to elect by secret ballot involved breach of fundamental principles, nor is it much easier to contend that each elector ought to have been supplied at the referendum with a copy of the proposed measure. Even less tenable was the suggestion that the legislature could not interfere with a royal prerogative, when in fact the provision deleted from the Constitution Act, 1902, was a statutory power and had nothing to do with the prerogative.[1] In such a case it seems unfortunate that leave to appeal should have been granted locally, but apparently it seems to have been held that the case fell within the terms of the Order in Council as to appeals.

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[1] *British Commonwealth Relations Conference*, 1933, p. 197.

[2] See *Journ. Comp. Leg.*, Third Series, vol. xvi, pt. i, pp. 130, 131, and the Colonial Secretary's defence, House of Commons, July 12, 1934.

[3] See *A.-G. for N.S.W.* v. *Trethowan*, [1932] A.C. 526.

Delegated Legislation.—The New Zealand case of *Nelson* v. *Braisby*[2] does not actually decide anything new, but it illustrates in a very interesting manner the complex issues which may arise under the exercise of delegated legislative power. It establishes the principle that delegation of legislative authority by the New Zealand Parliament to the Governor-General in Council is perfectly valid, although the Parliament itself is acting not under its general legislative powers as to New Zealand, but under authority as to Western Samoa conferred by British Order in Council, March 11, 1920, under the Foreign Jurisdiction Act, 1890, or perhaps derived from the mandate. The court disallowed the suggestion that, as the Parliament was acting under a delegation of authority in the case of Samoa, it was not entitled to sub-delegate powers of legislation. It was, therefore, held that the Governor-General in Council could make, subject to the terms of the Samoa Act, 1921, s. 45, regulations of legislative character. Moreover it was ruled that by such regulations the Administrator of Samoa was empowered to declare an organization of natives in certain cases a seditious organization, so that it became an offence under these regulations to further the purposes of an organization so proclaimed. It was not held by the court that the Governor-General in Council could delegate legislative power proper; the action of the Administrator was confined to administration of regulations enacted by a competent authority. The difficulties which led to an equal division of opinion as regards part of the conviction turned on points of interpretation of the regulations, and the only matter of general interest is the ruling that, when there is equality of judges in respect of an issue, the judgment appealed from should stand, the court invoking the practice of the High Court in England, since, as it was not sitting as a Court of Appeal proper, it was not necessarily bound by the statutory rule[3] affecting it in that capacity. Of much greater constitutional interest is the question[4] whether the Supreme Court, sitting as an appellate tribunal from the Court of Western Samoa, could grant leave to appeal to the Privy Council under the authority to grant leave which is given to it as the Supreme Court by Imperial Order in Council, January 10, 1910. The decision of the court was that it had no such power, but that its authority to hear appeals rested solely on the Samoa Act, 1921, s. 96 of which contemplated

[1] *Doyle* v. *A.-G. for New South Wales*, [1934] A.C. 511.

[2] [1934] N.Z.L.R. 559. I am indebted to Mr. Von Haast for information on this case.

[3] Judicature Act, 1908, s. 58 (2).

[4] [1934] N.Z.L.R. 636.

that its decision should be final. This decision leaves open the interesting question whether special leave could be granted by the Privy Council itself, but there seems no real doubt as to the existence of such power.[1] The issue is in effect already disposed of by the decision that it is proper to provide for appeal from Palestine to the Judicial Committee.[2] Mandated territories in the eyes of English law are closely assimilated to protectorates, and the wide authority of the Crown in Council under the Foreign Jurisdiction Act, 1890, applies as effectively to mandated areas as to ordinary protectorates.

Direct Taxation in Canada.—Another illustration of the difficulties of the issue of direct taxation in Canada is afforded by *Attorney-General for British Columbia* v. *Kingcome Navigation Co.*[3] The measure whose validity was impugned and denied in the courts of British Columbia was the Fuel Oil Act Amendment Act, 1930, which imposed a tax on every consumer of fuel oil in the province, and the grounds of attack were essentially (*a*) that the measure was virtually an import duty or a duty of excise and therefore an indirect tax; (*b*) that it was not a direct tax in view of the fact that the burden might be passed on; and (*c*) that it interfered with the Dominion control of trade and commerce. It was not difficult for the court to dispose of the first two contentions, and in doing so it commented helpfully on the difficulties suggested by *dicta* in *City of Halifax* v. *Fairbanks' Estate*[4] and the *McDonald Murphy Lumber Co.*[5] cases, showing that they must not be read as derogating in some measure from the rule of adhering to Mill's definition of direct and indirect taxation. As regards the third contention the court made some interesting observations, in the course of which it was pointed out that customs and excise duties are in their essence trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom it is exacted. It was made clear that the tax could not be ruled invalid because in a sense it affected the federal sphere of trade and commerce, and a useful contrast was drawn with the case of *Lawson* v. *Interior Fruit and Vegetable Committee*,[6] where on the face of it the provincial Act sought to limit importation, whereas the Act in question in the case before the court was merely a device for raising revenue.

The Privileges of the Crown in Respect of Documents.—An issue which has been much debated in the Dominions has been illumined by the decision of Macnaghten J. in *Spigelmann* v. *Hocker*. The issue there raised was one of the most unfavourable to any claim on behalf of the Crown to be entitled to withhold documents, and it is rather surprising that the Attorney-General should have argued on such broad lines as he adopted. The actual question was simply whether in a civil action a police officer appearing under *subpœna* could refuse to produce a signed statement made by a party when interviewed by the police three days after the accident which formed the basis of the litigation. In the final issue the Home Secretary assured the court by letter that the production of the particular document referred to as of other documents of the same class would be contrary to the public interest, and the Attorney-General repeated his assurance, thus rendering unnecessary the personal presence of the Home Secretary. Now, though Macnaghten J.[1] suggested some doubt as to the precise meaning of the Home Secretary's statement, it seems clear that he intended to rule that the document should not be produced, because it belonged to a class of documents which in his view ought not to be used except for official ends. On this understanding of the statement, it seems *prima facie* to fall precisely within the ruling of the Court of Appeal in *Ankin* v. *London and North Eastern Railway Co.*[2] where it was held that privilege could properly be claimed for all reports made under statute by railway companies to the Minister of Transport regarding accidents. Both Scrutton and Slesser L.JJ. seem to have held it proper to accept such a claim of privilege, but Macnaghten J. seems to have taken a different view, and one in close accord with the ruling of the Privy Council in *Robinson* v. *State of South Australia.*[3] The judgment there can only be interpreted in the sense that it always rests with the court to satisfy itself that privilege can properly be claimed, and that for this purpose it may inspect the document concerned. The decision insists that the South Australian Rule of Court there applicable agrees with the English Order XXXI. r. 19A (2) which provides that " where on an application for an order of inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." Moreover the Committee was clear—as against the Attorney-General's contention in the later case—that the term privilege applies to the right of the Crown to claim non-disclosure on the ground of injury to public interests. The Committee expressly approved inspection by the court even if an unambiguous assurance as to documents specified were given by a minister, as in *Queensland Pine Co. Ltd.* v. *Commonwealth of Australia*,[4] and negatived the contrary view taken in the High Court in *Griffin* v. *State of South Australia.*[5] It reinforced its view by referring to the attitude of the court in *Hennessy* v. *Wright*,[6] and declared that in *Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.*,[7] Scrutton L.J. had acted on a right of inspection and not by consent. It appears, therefore, that the doctrines that a minister can exclude examination by the court by giving a clear certificate (*a*) as regards a class of documents or (*b*) even as regards a single document, although they appear to have been acceptable to the Crown Proceedings Committee when it reported in 1927,[1] are not a sound expression of English law. *Ankin's* case should therefore be read merely in the sense that the court may if it thinks fit accept as decisive a ministerial statement regarding a class of documents, and *a fortiori* may with propriety normally accept such an assurance regarding an individual document, but that there remains with it even in the latter case an absolute discretion to examine the document and decide the issue for itself. It is true that the judgment of the Privy Council would not bind the Court of Appeal if there were any reason to suppose that it does not correctly express English law, but the probability is that its view is a sound exposition, and Macnaghten J.'s insistence on examining the report in the case before him and allowing it to be used seems unexceptionable.

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[1] Cf. *Nelson* v. *R.*, [1928] W.N. 197.

[2] *Jerusalem and Jaffa District Governor* v. *Suleiman Murra*, [1926] A.C. 321.

[3] [1934] A.C. 45.

[4] [1928] A.C. 117. Cf. Kennedy and Wells, *Law of Taxing Power in Canada*, pp. 50 ff.; Keith, *Journ. Comp. Leg.*, Third Series, vol. x, pt. i, pp. 104, 105.

[5] [1930] A.C. 357.

[6] [1931] S.C.R. 357.

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[1] 50 T.L.R. 87.

[2] [1930] 1 K.B. 527.

[3] [1931] A.C. 704.

[4] 1920 St. R. Qd. 121.

[5] 35 C.L.R. 200; 36 C.L.R. 378. In the Scottish case *Carmichael* v. *Scottish Co-operative Wholesale Society*, [1934] Sc.L.T. 158, Lord Wark held that, while the court could always inspect, it would normally accept a declaration regarding a specific document, as distinct from a class of documents.

[6] 21 Q.B.D. 509.

[7] [1916] 1 K.B. 822.

The Crown and its Servants.—The many difficulties still existing as to the relation between the Crown and its servants are in part elucidated by the decision in *Reilly* v. *The King.*[2] The issue there raised was whether an officer who held an appointment under a Canadian statute could bring a petition of right successfully in respect of the loss sustained by his removal from office under another Statute. It sufficed to dispose of the issue that the second Statute necessarily overrode the first and deprived the suppliant of any legal ground for redress. But two points were discussed, and in part decided. The Committee dissented from the view of the Exchequer Court that the relation between the Crown and a servant could not be contractual; there might be such a relation, though the Crown could determine the contract at will; this view is in some degree different from that of the Court of Appeal in *Kynaston* v. *Attorney-General.*[3] Secondly, the Committee dissented from the view suggested by Orde J. in the Supreme Court that the Crown must necessarily be able to dismiss at pleasure any servant. It is clear that this applies merely where statute does not intervene, as in the case of *Gould* v. *Stuart*,[4] or in those of judges who normally hold by a statutory tenure during good behaviour.

Western Australia and the Commonwealth.—The long contention between Western Australia and the Commonwealth has reached a definite point in the final decision of the Labour government in the State to present by delegates its case for the right to secede from the Commonwealth to the British government and Parliament. The case for the State has been set out in full detail[5] and the respect which it has elicited is proved by the publication by the Commonwealth of a rather unhappily styled *Case for Union*, the constitutional part of which has the authority of Sir R. Garran, formerly Solicitor-General of the Commonwealth, and the Hon. J. H. Keating, formerly a Senator for the State of Tasmania. The essential difficulty in which the State has been placed arises from the tariff policy of the Commonwealth. It is obvious that free trade within the Commonwealth places a grave handicap on the industrial development of the State in view of the competitive power of the industries of New South Wales and Victoria. Unfortunately also the fact that Western Australia relies largely on wheat and wool exports minimizes the value of connexion with the Commonwealth. But there are other issues of importance. The State is definitely afraid of the tendency, as it holds, of the High Court to minimize the position of the States in favour of the Commonwealth; it stresses not unfairly the painful impression created generally by the decision of the High Court in favour of the wide powers of legislation claimed by the Commonwealth under the amendment of the Constitution, s. 105A, which enabled it to force New South Wales to abandon the policy of repudiation of payment of interest on debts. The Commonwealth naturally denies the force of the State contentions, and stresses the necessity of Australian unity for purposes of defence, for financial stability, and other reasons. Constitutionally, however, it must be admitted that the British government and Parliament can hardly be expected to give effect to the appeal of the State. No doubt the majority for secession is large, but it is not overwhelming, and it would be contrary to every principle of constitutional government—apart from the Statute of Westminster which is not yet in force in Australia—for the Imperial Parliament to break up a federation on the application of any part. The federation was intended to be indissoluble, and Western Australia accepted the constitution deliberately at a referendum by a decisive vote. It may well be that acceptance was an error, and it is true that it was due in part to pressure by the Secretary of State for the Colonies. But what has been done cannot easily or wisely be undone, and it is only unfortunate that circumstances seem to prevent the Commonwealth making any very effective move to conciliate feeling in the State. It is interesting to note the parallel with Nova Scotia, but that province had a far stronger case than has Western Australia. It was virtually forced into the Canadian federation, and refused the right of secession, and its losses through federation exceeded greatly those of the State. But the petition is a useful reminder that federation can easily be overestimated as a solution for political difficulties. South Australia and Tasmania have serious grievances as well as Western Australia, though in these cases it has proved possible to remedy in some measure their difficulties by generous federal grants. A like procedure has done something to mitigate from time to time the bitterness felt by the maritime provinces in Canada at the decline of their prosperity and importance in contrast with the vast expansion of the west.

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[1] Parl. Pap. Cmd. 2842, pp. 24, 25.

[2] [1934] A.C. 176.

[3] 49 T.L.R. 300, at p. 301.

[4] [1896] A.C. 575.

[5] *The Case for Secession*, published as a special edition of the *West Australian*, March 27, 1934.

Crown Legislation for Ceylon.—While the prerogative power to legislate for Ceylon has existed from the annexation of the island, and has been carefully reserved under the new constitution,[1] it has been employed for unusual ends in the giving of authority to the Governor to regulate by quotas the importation of foreign (mainly Japanese) cotton and artificial silk piece goods. The normal procedure in such cases, of course, is by local legislation, but the ministers were unable to introduce such legislation, which in their opinion would press with undue hardship on the workers of Ceylon who were anxious to obtain the cheap goods available for import from Japan. It must be noted also that the ministry had been unable to obtain from the British government certain preferences for Ceylonese exports which they had requested, and the refusal to adopt the legislation suggested as regards Japanese imports may have stood in some causal relation to the British refusal. It was, however, announced by the Colonial Secretary in the House of Commons on July 30 that it was felt impossible to permit Ceylon to stand outside a scheme of imperial importance and application. In most colonies it has been easy to obtain, nor has there been much opposition to, local legislation, but it is noteworthy that in the Straits Settlements the application of the new system was the subject of protest by the unofficial members of the Legislative Council. Steps which raise the local cost of living in the interest of British manufacturers can, of course, be justified only by paramount necessity, and on constitutional grounds it is to be regretted that accommodation with the local government could not be achieved. The action of ministers in declining to resign on the issue was clearly constitutional.

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[1] *Abeyesekera* v. *Jayatilake*, [1932] A.C. 260.

NOTES.

Two Lectures by Lord Macmillan.—The Rede lecture entitled "Two Ways of Thinking," which Lord Macmillan delivered before the University of Cambridge, is the kind of publication which tends to escape notice because it is published in an inexpensive form (Cambridge University Press, 2s.) and does not contain a large number of pages. But Lord Macmillan has compressed into less than fifty pages more solid material than many writers, even professedly serious, can put in ten times that number. His primary proposition is of considerable practical value at the present time. As a Lord of Appeal he has had occasion to notice the difference in the historical background of the English and Scottish systems of law. The Roman law was based on the conception that all human relationships could be assorted and rationalized in accordance with certain fundamental principles. The influence of this conception has prevailed down to the present day in a large portion of the civilized world. On the other hand, the English genius has always had a strong aversion from and distrust of theory and principle. The common law has been built upon precedent applied to the question before the court. Lord Macmillan proceeds to show how the two ways of thinking are to be found in the realms of religion and political economy. He shows their application to current problems of the day. "The failure of the multitude of international conferences of recent years to achieve the aims which we all profess to have in common," Lord Macmillan observes, "is in no small degree due to the incompatibility of the ways of thinking of those who have participated in them." He concludes, with the warm generosity of a Scotsman, with a cordial tribute to the English way of thinking. "When all is said and done," he writes, "it is the tolerance, the magnanimity, the readiness to compromise and to assimilate, the very illogicality, if you will, that are so typical of the English mind which have always been the secret of England's influence and power and which at this moment, when the whole of the rest of the world is seething with new theories of government, new theories of economics, new theories of everything, have enabled her to retain a stability which is the envy of every other nation."

"The Professional Mind" is the title of the other lecture which supplements the earlier lecture, and was delivered as the Maudsley Lecture before the Royal Medico-Psychological Association. It is available as a reprint from the *Journal of Mental Science* (London: Adlard & Son). It makes a comparison of the various types of professional minds as the other does of national minds. In particular, Lord Macmillan gives an informing diagnosis of the legal mind. " There is no professional type," he observes, " which throughout the ages has been more consistently the subject of deprecatory comment." The layman's objection to lawyers might be cited as an example of the Englishman's inconsistency since he invariably turns to the lawyer to guide his deliberations in all matters of importance. If a strong committee or commission is required in any important matter there is invariably a demand for a legal chairman. May it not be that the average Englishman's attitude towards the lawyer in everyday life has the same foundation as his difficulty in understanding the foreign way of thinking in national affairs ?

Lord Macmillan's lectures are of peculiar interest to members of the Society of Comparative Legislation, since they illustrate the value of the comparative method of study. Moreover, they show the importance of collecting information upon the operation of laws, since similarity of enactments is not necessarily followed by the same results in different environments or by alternative ways of interpretation in British and foreign countries. That is one of the fundamental difficulties in the operation of international agreements in such matters, for example, as conditions of labour. Even in the more limited sphere of comparative study within the British Empire these differences have to be taken into account, and Lord Macmillan's lecture may be welcomed with gratitude as a contribution of the greatest importance to a study of the background which is indispensable to a due appreciation of the legislation of any country.

The Rule of Law.—In view of recent attacks upon the doctrines of the late Professor Dicey, the following note from a learned correspondent in the Far East is of value :

The constitutional lawyer is chiefly concerned with what the law is rather than what the law ought to be and must avoid too considerable a trespass upon the domain of political science, but the study of law would be too much a matter of dry bones if there were not permitted occasional attempts to examine tendencies of development. Moreover from the seventeenth century onwards the boundary between public law and public affairs and practice has always been crossed easily in both directions. The rule of law has been described as an idea which, first conceived in the city-republics of ancient Greece, has vitalized Western society and has been slowly transferred into institutions by Western civilization.[1] The same writer considers that the fact that the idea of the rule of law is a peculiarly Western product accounts in no small measure for the difficulty found by the East, and China in particular, in adjusting its mutual relations with the Western powers.[2] Thus no excuse is needed for an attempt to assess in a journal devoted to Comparative Law the present importance of the doctrine of the rule of law. In his Report to the Shanghai Municipal Council, Mr. Justice Feetham expressed the view that the rule of law in the International Settlement as contrasted with the arbitrary regime outside is a main factor in the unparalleled commercial and economic supremacy of Shanghai.[1] It is the failure of China to recognize the practical application of the rule of law that has made necessary the retention of extra-territorial rights.

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[1] Lionel Curtis, *The Capital Question of China*, p. 16.

[2] *Ibid.*, p. 16.

The recent Committee on Ministers' Powers [2] has paid tribute to the importance of the doctrine of the rule of law as expounded by Dicey, and has set out once again the familiar three meanings—absence of arbitrary power, the subjection of all to the ordinary law administered by the ordinary courts, and the protection of individual rights by court decisions, but there is a definite tendency among some modern constitutional lawyers to belittle the present importance of Dicey's doctrine. Thus a recent writer says of Dicey [3]: "few of his principles appear to me to be applicable to the modern Constitution," and again [4]: "The rule of law was always a political doctrine, and it had no validity after the Constitution rejected the concept of public order and developed instead the concept of public service." A doctrine which has with some reason been described as a fundamental concept of Western civilization cannot be so lightly dismissed.

It is, of course, true that in England the powers of Parliament are in theory unlimited, and that, though there is a reign of law, the law may at any moment be changed.[5] It is true too that the law may give enormous and discretionary powers to the government.[6] It is not, however, the whole truth that the rule of law is but a principle of political action, meaning only that public authorities ought not to have large powers.[7] There is a real and close connexion between the three meanings of the rule of law. The core of the whole matter is certainty, absence of arbitrariness and the possibility of confidence in business dealings. "It is no coincidence that the Anglo-Saxon people who had carried the principle (that of the rule of law) farthest excelled in commerce." [8] If disputes are settled in the ordinary courts by independent judges, even a capricious legislature cannot altogether destroy confidence and certainty. Individual rights are best maintained by the decisions of courts which are not only in name courts of justice rather than of administrative expediency. No constitution can or indeed should attempt to enforce complete rigidity, but a due system of checks and balances can "to a large extent secure the liberty of the individual against arbitrary acts of the executive, and also enable different authorities, central and local, each to exercise its own powers unimpeded in its legitimate sphere." [9] It must not be forgotten that public authorities may as well as individuals need the protection of the rule of law.

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[1] *Report to the Shanghai Municipal Council*, pt. iii, ch. vi.

[2] *Report of Committee on Ministers' Powers*, 1932. Cmd. 4060, pp. 71–3.

[3] W. Ivor Jennings, *The Law and The Constitution*, p. x.

[4] *Ibid.*, p. 263.

[5] *Ibid.*, p. 47.

[6] *Ibid.*, p. 255.

[7] *Ibid.*, pp. 255–6.

[8] Curtis, *op. cit.*, p. 15.

[9] Feetham, *op. cit.*, pt. ii, ch. v.

The recent tendency to disparage Dicey's doctrine is, however, based on a real need to adapt principles to changing conditions. A writer with no undue bias towards bureaucracy has in discussing departmental legislation stressed the necessity of bringing into proper perspective a problem which is vital to the private citizen living, as he or she does, in a State which in many directions is imposing its controlling hand year by year.[1] Without departmental legislation government in the modern State could not be carried on. It is possible too to preserve a due separation of powers without condemning altogether the establishment of administrative tribunals. There is room, if not a need, in the modern State for expert tribunals versed in public administration, provided that the independence of such tribunals is properly safeguarded. Judicial control of public authorities by the ordinary courts prevents the oppression of the individual, but does not prevent the stultification of the official.[2] The restrictive interpretation of statutes may frustrate the main objects of modern administrative law.[2] Provided that there are preserved publicity, independence, an observance of reasoned rules of evidence, administrative tribunals are not incompatible with the rule of law rightly interpreted.

It is not only in England that these considerations are important. Eastern countries too have their governmental problems and, if they are to be persuaded to embrace the rule of law, it must be presented to them in a reasonable and modern guise. China—to take but one instance—will never accept a doctrine which rules out altogether administrative courts and executive legislation. Too great stress on a conservative and ultra Anglo-Saxon conception of the rule of law will defeat its own ends. Emphasis must be placed on essentials, an independent judiciary, due demarcation of powers, publicity, certainty, and all that is opposite to arbitrariness. Similar problems arise in the sphere of Criminal Law. Insistence that there is no sound procedure but that of the Common Law will only make it difficult to ensure the adoption of the essentials of a fair trial and will prevent the Common Law from making its proper contribution to the legal development of Eastern and backward nations.

G. Godfrey Phillips.

Adat Law in Indonesia.[3]—On the initiative of the late Dr. C. van Vollenhoven, LL.D., Professor of Adat Law, Constitutional Law and Administrative Law of the Netherlands East Indies in the University of Leiden—whose much-lamented death in May 1933 came as a shock to the scientific world—the Royal Institute of Philology, Geography and Ethnology of the Netherlands East Indies at The Hague decided in 1909 that particulars should be collected regarding the native customary or common law (Adat law) prevailing on the various islands of the Malayan Archipelago forming the Netherlands East Indies, and that these collections should be published from time to time when considered convenient. Arrangements were made with the Batavia Society in Java and the co-operation was obtained from the Dutch East Indian Government.

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[1] E. C. S. Wade, *Cambridge Law Journal*, vol. v, no. 1, *Departmental Legislation*.

[2] Jennings, *op. cit.*, p. 227.

[3] *Adatrechtbundels* (vols. xxxii to xxxvii). (Bezorgd door de Commissie voor het Adatrecht en uitgegeven door het Koninklyk Instituut voor de Taal-, Land- en Volkenkunde van Nederlandsch-Indië.) Martinus Nyhoff, The Hague, 1930–4.

A Committee was formed for Adat Law under the leadership of Professor C. Snouck Hurgronje, LL.D., of Leyden, and the Hon. Secretaryship of Professor C. van Vollenhoven. The first volumes, so-called "Adat Law Bundles," appeared in 1911. They followed each other in rapid succession. In 1934 vol. xxxvii was published.

This was followed in 1917 by the Adat Law Foundation, which was established with the object of studying customary law (and as far as possible making a collection thereof), not only in the Dutch East Indies, but in the whole of that part of the eastern world which is comprised in the word " Indonesia." The work once begun, obtained thereby an extension, nationally and internationally, of far greater proportions than originally planned. Indonesia is understood to comprise besides the Dutch East Indies, Formosa (the Indonesian part of the inhabitants), the Philippines, the non-Dutch parts of New Guinea, Timor and Borneo, the Malay Peninsula as well as Madagascar.

Internationally—in order to obtain the necessary information from the parts of Indonesia beyond the Dutch East Indies—the co-operation was sought and obtained from the various countries which were interested while the sympathy and co-operation was enlisted of the " Union Académique Internationale " at Brussels.

All this was not achieved without a struggle nor was it the first attempt to discover native customary law. Former attempts, however, had occurred only spasmodically. The period from 1783–1820 (which includes Raffles' Governorship of Java) had died down; a revival of interest between 1865–70 had no further results and other attempts between 1883–94 and 1904–6 had no permanent following. It was only in 1909 that systematic research began and was continued as described above.

Criticism is still heard on the part of those who fear that native common law (Adat law) may prevail over the principles of Moslem, Roman and European law, though the existence of the Adat and its survival among the natives in their villages and communities can hardly be denied. Professor van Vollenhoven has described the principal legal communities which manifest themselves among the Indonesian population. There exist in the first place the groups held together by common descent, which might be called the genealogical groups, among whom besides the individuals, the family, the clan and the bond of various clans are—either in turn or at the same time—considered to be the *personæ juris* who are subject to the law and with whom all rights and duties rest which are bestowed upon them by the Adat. A second group is formed by those who belong together by the place where they live and which may be called the territorial group enclosing again genealogical groups. The village or the district has its own legal authority and its own property comprising the family as a group of its own. In the third place in many parts of Java and elsewhere villages are found as legal communities with individuals as legal entities clothed with authority, the village taking the place of the family group. In addition, within the boundaries of all these groups others are found which are created by the free-will of the individuals themselves.

So far as the native princes are concerned, two forms of exercising authority may be observed. Either they place themselves above the various communities and act by way of arbitrators, or they exercise greater authority and make the population subservient to themselves.

In these groups the Adat law prevails and is maintained by the population notwithstanding attempts on the part of Europeans to introduce European legal principles which are utterly different from the customs and common law of the Indonesians. European law may, however, assimilate the various groups and level the native communities to one common plain. Research into Adat law and the recording of its manifestations in the various parts of Indonesia have as their object, to obtain knowledge of its variations and—if possible—to find its common characteristics on the basis of native customs themselves. Thus by assimilation such customs or Adat might be developed on their own ground, without the replacement thereof by some foreign growth. Professor van Vollenhoven's aim was that Western, viz. European, law should not be imposed upon the natives, as they would not understand it and it might be antagonistic to their own legal convictions. Rules and regulations, however, should only be made for natives after full knowledge had been obtained of their own customs and legal conceptions. Only with such knowledge would it be possible to discriminate and to make statutory provisions where and whenever necessary. Full knowledge, however, of the Adat and Adat law is essential, and in order to obtain such knowledge the research work recorded in the " Adat Law Bundles " is of primary necessity.

This research work—so far as the Netherlands East Indies are concerned and the 37 " bundles " which so far contain the result thereof—is divided into 19 legal divisions or circles, viz. : 1. Atjeh (exclusive of the lands of Gajo and Alas) ; 2. the lands of Gajo, Alas and Batak ; 3. the Minangkabau ; 4. South Sumatra ; 5. the Malayan part of Sumatra (inclusive of Sumatra's east coast without the Batak regions, together with the Riou-Lingga archipelago which would include Malacca) ; 6. Banka and Bilitoeng ; 7. Netherlands Borneo ; 8. the Minahasa ; 9. the Gorontalo territory ; 10. South Celebes (inclusive of the Boeginese west coast of that island) ; 11. the Toradja territory ; 12. the Ternate archipelago ; 13. Ambon with its surroundings (Ceram, Boeroe, etc.) ; 14. Netherlands New Guinea ; 15. Netherlands Timor with its surroundings ;

16. Bali and Lombok; 17. Middle and East Java and Madoera; 18. The Principalities (Vorstenlanden) and 19. West Java (the Pasoendan).

In each of these territorial divisions the Adat law is most exhaustively dealt with under various titles, viz.: 1. sources; 2. territorial limits; 3. legal units; 4. individuals; 5. government; jurisdiction, administration; 6. Adat law of nations; 7. law of relationship; 8. marriage laws; 9. law of succession and inheritance; 10. real property law; 11. law of indebtedness; 12. criminal law; 13. legal procedure; 14. development. Where the legal unit is genealogically grouped together, or the race, the clan, the family forms the material from which the territorial unit is built up, the law of relationship precedes all the other matters.

The 6 latest bundles which were published 1930–3 relate to South Sumatra, Java and Madoera, Sumatra, South Celebes and Borneo, Bali and Lombok.

W. R. Bisschop.

New Malayan Bankruptcy Legislation.—It is recorded in the annual report of the Federated Malay States Bankruptcy Department that during 1933 reciprocal arrangements were made affecting bankruptcy between the F.M.S. and the State of Johore. A revised scale of fees based on the English rates was approved by Government and brought into force on October 1. A proposal to increase deposits from $20 to $50 in the case of creditors' petitions, and from $20 to $30 in the case of debtors' petitions under Rule 101, was submitted to Government, and the matter was still under discussion at the end of the year.

The Position of the American Indian in the Law of the United States.—As an addendum to his article which was published in the February number of the *Journal*, Mr. W. G. Rice, Jr., contributes the following note:

The Commissioner of Indian Affairs, in order to carry out his programme for gradual increase of Indian autonomy, has caused to be introduced by Senator Wheeler a Bill (Senate Bill 2755, introduced February 6, 1934), which provides for setting up Indian governments under charter from the Secretary of the Interior. "Each charter shall provide for the gradual elimination of administrative supervision as the Indian community shows progress in the effective utilization of its resources." "An Indian community chartered under this Act shall be recognized as successor to any existing political powers heretofore exercised over the members of such community by any tribal or other native political organization comprised within the said community, not withheld by such tribal or other native political organization, and shall, subject to the terms of said charter, further be recognized as successor to all right, interest and title to all funds, property, choses in action, and claims against the United States heretofore held by the tribes or other native political organizations."

The Bill also provides for "the training of Indian members of chartered communities and other Indians of at least one-fourth degree of Indian blood, in the various services now intrusted to the Office of Indian Affairs, and in any additional services which may be undertaken by a chartered Indian community, including education, public health work, and other social services ; the administration of law and order ; the management of forests and grazing lands ; the keeping of financial accounts, statistical records, and other public reports ; and the construction and maintenance of buildings, roads, and other public works."

The Bill also makes elaborate provision to prevent further allotments to individual Indians and to regain land already allotted. The programme is intended " to establish a permanent basis of self-support for Indians living under Federal tutelage ; to reassert the obligations of guardianship where such obligations have been improvidently relaxed ; to encourage the effective utilization of Indian lands and resources by Indian tribes, co-operative associations, and chartered communities ; to safeguard Indian lands against alienation from Indian ownership and against physical deterioration ; and to provide land needed for landless Indians and for the consolidation of Indian landholdings in suitable economic units."

The fourth part of the Bill provides a Court of Indian Affairs to deal with all crimes committed within the territory of any Indian reservation or chartered Indian community and to adjudge cases of various categories concerning Indian tribes, communities, or individuals. It also can hear " appeals from the judgment of any court of any chartered Indian community in all cases in which said Court of Indian Affairs might have exercised original jurisdiction."

In some of its features, especially the provision for the Court of Indian Affairs, the Bill has the character of a " trial balloon " and of course it is by no means certain that Congress will approve even those provisions to which the Commissioner of Indian Affairs is quite definitely favourable.

Institute of Legal Research.—The report of the Committee which, under the chairmanship of Lord Atkin, has been considering the organization of legal education in England is of general interest to all who are concerned with that subject in any part of the Empire. But the portion which is of particular importance to members of the Society of Comparative Legislation is that which deals with the proposal to found an Institute of Legal Research. The work of such an Institute would be analogous in the realm of Law to that which has been accomplished by the Institute of Historical Research. It might be similarly affiliated to the University of London in a suitable building with a Director, surrounded by Fellows and research students ; or have an independent status like the Royal Institute of International Affairs. No doubt, students from the Dominions and other countries would be attracted by it, and the supply of such a centre would encourage the development of the activities connected with it.

Research workers, however, must have the necessary material, which, in this case, consists of the text of Statutes, Law Reports and legal textbooks, scattered in a number of libraries. The proposal put forward by the Committee for the formation of a central catalogue of the contents of the London Law Libraries is one which was advocated in the columns of the Society's *Journal* so long ago as 1908 (New Series, vol. viii, p. 469), and has been frequently mentioned since. For a time, there were advocates of a complete library, but the increase in the amount of material soon led to the realization of the impossibility of providing the site, constructing the building, equipping it with books and maintaining its establishment, of which, as the Committee observe, the expense would be prohibitive. The combined catalogue is the only solution, and it is much to be hoped that the Report of this authoritative Committee has brought it appreciably nearer to accomplishment.

The Stair Society.—In the beginning of June, at the instigation of Lord Macmillan, there were issued to members of the legal profession in Scotland and to others elsewhere likely to be interested " Proposals " for the formation of a Scottish Legal History Society. The proposed society is on the lines of the Selden Society in England, and will have the same aims—the editing and publication of Scottish legal sources and the fostering of interest in the study of Scottish legal history. It is suggested that the Scottish Society should be designated " The Stair Society " in honour of the greatest name in the history of Scots Law. A small provisional committee has been formed to make known this project and to ascertain the extent of the support it is likely to receive. Included in the committee are Lord Dunedin, Lord Thankerton, Lord Macmillan, Lord Clyde, Lord Alness, Lord Aitchison, Sir William Chree, Sir William Johnston and other distinguished Scots lawyers. The interim secretary is Dr. Charles A. Malcolm, Librarian to the Society of Solicitors in the Supreme Courts, Edinburgh.

Lord Macmillan, in his " Proposals," emphasizes the need for a history of the law of Scotland, the existing reproach to Scotland that no such history has yet been written, and expresses the hope that the Stair Society will pave the way for the undertaking of this work. He stresses the importance and attractiveness of the field of study offered by research in Scottish legal history, the origins of Scottish law and legal institutions, and their moulding influences. It is pointed out that the legal system of Scotland " is also of unique interest among the legal systems of the world in that it affords the only instance of the combination in theory and practice of the Civil Law and the Common Law, the two great rivals for supremacy in the legal world. On the one hand, it has drawn its inspiration largely from the law of Rome, yet, unlike the Continental nations under the Civil Law, it has no code ; on the other hand, while it shares the respect for precedents distinctive of the Common Law, it has also been systematized in the works of authoritative institutional Writers."

Indeed Professor Lévy-Ullmann has gone so far as to say that " Scots law, as it stands, gives us a picture of what will be some day (perhaps at the end of this century) the law of the civilized nations, namely, a combination between the Anglo-Saxon system and the Continental System." It will also be recollected that the greatness of the interest of Scots Law as a subject of comparative study was most ably demonstrated by Lord Macmillan when he chose that title for his inaugural address as President of the general section of the International Congress of Comparative Law held at The Hague in August 1932.

It is earnestly hoped that this proposed Society will receive the support of lawyers in many other countries besides Scotland. It is believed that there may be material of interest and value to the student of Scottish legal history in the archives of those Continental universities to which Scottish students formerly resorted, but the promoters of the Society also hope that it will enlist an even wider support and appeal to lawyers in every part of the world who are interested in the Scottish legal system.

J. C. G.

American Journal of International Law.—In the January number Mr. Bouvé analyses the numerous boycotts which the Chinese have organized against various foreign nations, and reaches the conclusion that they " constitute an international delinquency for which liability may arise under the generally accepted principles of international law." Dr. Lauterpacht contributes an interesting article which seeks to analyse the meaning of the phrase " resort to war," as used in the League Covenant, with special reference to the Manchurian dispute. In his view it would have been competent, though not obligatory, for the Assembly to find that the Japanese action constituted a " resort to war," and he evidently regrets that this decision was not taken. Professor Borchard writes from a point of view diametrically opposed to that of Dr. Lauterpacht. In a short but vigorous article he gives his unqualified support to the views put forward elsewhere, by Mr. J. B. Moore, and regards the whole of the post-war security system as a violation of the accepted principles of international law and for that reason a grave menace to peace. Among the other contributions we may mention Professor Hudson's annual review of the year's work of the Permanent Court, and an interesting note by Mr. J. S. Reeves discussing the application of the principles of discovery and occupation to territory in the Antarctic. In the Supplement we are given the text of the documents constituting the American recognition of Soviet Russia.

The April number contains two substantial contributions to the rapidly increasing volume of material upon the subject of State responsibility. Professor Dickinson, dealing with the question of responsibility for arrest or seizure in violation of international law, develops the thesis that courts, as organs of the State, are limited in their competence by the restrictions which international law and treaties impose upon the State which they represent. Mr. W. G. Rice enters the ranks of those who seek to define the term "denial of justice," a problem which promises to develop a literature comparable to that which essays to analyse the meaning of negligence in municipal law.

An interesting article by Professor Hudson, well stored with historical learning, discusses the question of "double criminality" in the law of extradition, with special reference to the recent Factor case.

It was not to be expected that Mr. John Bassett Moore's vigorous attack upon the theory that there is now a "new international law" should go entirely unanswered, and Professor Fenwick briefly puts the case for the other side in a "note" which might well have been expanded into an article. More will be heard of this controversy, the solution of which is indeed fundamental to the whole theory of modern international relations.

As usual, the notes and editorial comment in this number abound in matter which combines topical interest with good scholarship. These short contributions make the journal perhaps the best-informed centre of American discussion upon matters of current international concern.

H. A. S.

Columbia Law Review.[1]—The January number contains an article by Professor Winfield, criticizing the accepted English doctrine as to the relation of negligence to duty. Admitting that the idea of duty in negligence is now too deeply embedded in English law for its removal to be either practicable or desirable, Professor Winfield argues that historically its introduction was an accident and practically its presence serves no purpose of value.

In the same number, among other valuable contributions is a review by Professor Kantorowicz of Professor Cohen's *Law and Social Order*, which the reviewer considers "the most important of the many recently published contributions to the philosophy of law in any American and European country."

In the February number Professor Yntema pleads in an article on Legal Science and Reform for a more serious scientific study of the administration of justice. The cycle of legal history has returned upon itself. Conceived first as a system of remedies and then as a system of rights, law is now coming to be regarded as "an instrumental procedure to achieve purposes beyond itself, defined by the conditions to which it is directed. Practical reform requires more than common sense; the problems of judicial administration have become so complex as to require detailed scientific study for their understanding and solution." A very lively and informing review by Mr. J. B. Moore of Jaffe's *Judicial Aspects of Foreign Relations*, deals mainly with the "recognition" of States. In this connexion he remarks: "Courts do not 'recognize' governments; the recognition of governments is an executive or administrative function.

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[1] Vol. xxxiv, nos. 1–6 (Jan.–June 1934).

The business of courts is to administer justice as between man and man, and as between men and governments, so far as concerns the non-political transactions that fall within the judicial domain. For this purpose the courts had previously taken, and should have continued to take, the ground that the existence of a foreign government as an actual legal entity, possessing and exercising governmental powers, was to be treated as a fact of which judicial cognizance might be taken on the ground of general notoriety or of which proof might be required. This was settled law as well as common sense. The notion that a government may permit and even encourage its citizens to do business with another country, and then ask its courts to outlaw their transactions, is nothing less than a legal monstrosity."

In the March number Mr. Wilson of New York discusses the American system of Lease Security Deposits from both a practical and theoretical point of view. The practice for the lessor to take a deposit by way of security from the lessee appears to be usual, more particularly in those States in which the landlord has no right of distraint or statutory lien. The legal questions which arise in connexion with such deposits are varied and intricate nor have the courts yet given definite rulings as to whether the relation between lessor and lessee with regard to them is to be considered one of simple debtor and creditor or of pledgee and pledgor or of trustee and beneficiary. One would expect these questions to arise most frequently in case of the insolvency of the lessor, but Mr. Wilson does not, in the text, refer to this situation.

Professor Yntema reviews Sir Frederick Pollock's recent book of reminiscences. He quotes a passage commending the Harvard method of law teaching, and remarks that it is " a tribute to the pertinacity of academic tradition " that convictions as to the rightness of the Harvard method " have not materially altered the methods of legal instruction in England during the last fifty years." Possibly, however, more than academic tradition has been involved in perpetuating instruction on a doctrinal plan. At any rate the value of doctrinal work on the common law emanating from the Universities has been abundantly shown in the last fifty years and Sir Frederick's own invaluable treatises are among the most shining examples.

The review of a work on City Management, which deals with the struggle for good government in Cincinnati, gives a terrifying picture of municipal politics.

The numbers for April, May and June are equally good reading. American legal writing has a directness and vigour of attack which contrast with that of " stodgy " England, as our respected country is pointedly termed in one place. An article by Professor Nelles of Yale, " Towards Legal Understanding," which runs through two numbers, is refreshing in the frankness with which the writer points out the reasons which often determine judicial decision. He, like Professor Grant of California, in the June number, discusses with freedom and spirit many of the Supreme Court decisions upon that well-worn subject of interpretation "The American Constitution." Professor Nelles uses terms which do not belong to classical English, but his views are trenchant and interesting. "Permission of departure from paramount legal-moral obligation," he says, "is forced into judicial mores, and its limits widened or narrowed, by pressures for interests moralized by other classes in conditions in which their power approaches dominance in Society. Lord Mansfield was backed and approved by such tremendous power, especially in the commercial middle class, that legal-moral condemnation seemed idle cackling. He did not have to take the trouble to simulate consistency with legal usuals."

Professor Llewellyn of Columbia is enlivening not to say audacious in his review of "Modern Theories of Law." His approval and his condemnation alike are definite. Of Dr. Lauterpacht's discussion of Kelsen he most thoroughly approves.

F. M. G.

Indian and Far Eastern Cases on the Conflict of Laws, 1928-1933.—*Errata.*—On p. 120, line 31, for "separated" read "inherited"; p. 122, line 37, for "this" read "his"; p. 123, line 3, for "*Salvesen* v. *Salvesen*" read "*Salvesen, otherwise von Lorang* v. *the Administrator of Austrian ex-Enemy Properties*," and give the reference [1927] A.C. 641 (or more simply, or course, "the *Salvesen* case"; p. 123, line 9, for "1869" read "1872."

NOTICES OF BOOKS.

FEUDAL LAW.

In these two dignified volumes Sir Thomas Craig's classical treatise on the Feudal Law appears for the first time in an English translation,[1] more than three hundred years after its composition. The *Jus Feudale* was first printed in 1655, forty-seven years after its author's death, in an edition prepared by Robert Burnet, afterwards Lord Crimond, who, after descanting on the previous "miserable condition of our Scottish law," proclaims that "our author rose like another Justinian and extracted light out of the legal darkness; and under the title of a treatise on the Feudal Law embraced the whole body of our Scottish jurisprudence, discussing every important matter in a lucid and learned order and reducing all to their original fountains of the civil and feudal law." Burnet embellishes his panegyric with an anecdote of a young friend of his who was on the point of renouncing all hope of acquiring a competent knowledge of Scots law when he accidentally fell in with a copy of Craig's treatise. "With it as his guide he recovered his courage, began to attend the Court and became one of the most distinguished lawyers of his time."

The second edition was published at Leipzig in 1716, by Luther Mencken, a learned German jurisconsult, a fact which testifies to the esteem in which the work was held on the Continent; indeed, as Lord Clyde tells us, the *Jus Feudale* at the end of the seventeenth century was the subject of courses of lectures in the Universities of Utrecht and Leyden. In 1732 the third and best edition was issued from the press of the Ruddimans in Edinburgh, under the editorship of James Baillie.

It has been lamented both by his biographer, Patrick Fraser Tytler, and by the eminent feudalist, Walter Ross, that Craig failed to provide us with a history of the antiquities of Scots law. As Fraser Tytler points out, there were still extant in Craig's day many documents which have since perished and which could have thrown light upon the legal history of Scotland, light "now extinguished for ever. In the investigation of such a subject, what would not the united industry and genius of such a mind as that of Craig have accomplished?" Walter Ross is even more emphatic in his regret. "It has most unfortunately happened," he says,

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[1] The *Jus Feudale*, by Sir Thomas Craig of Riccarton, with an Appendix containing the Books of the Feus. A Translation by The Right Hon. James Avon Clyde, LL.D., Lord Justice-General of Scotland and Lord President of the Court of Session. Two Volumes. (Edinburgh and London: William Hodge & Co., Ltd., 1934.) Pp. xxxiv + 1211. £5 5*s*. net.

"that the man who from extensive learning, intense application, a taste for study, and who from the circumstance of flourishing at an early period was perhaps better fitted than any other either of his contemporaries or successors to give the country a complete system of her national jurisprudence not only endeavoured to destroy the credit of the few books or evidences of the common law which were to be found, but has almost sent them into oblivion in favour of two foreign systems, the civil and the feudal laws." Ross is doubtless referring to Craig's well-known denunciation of the authenticity of the "Regiam Majestatem" which he characterizes as "a blot on the jurisprudence of our country," the fabrication of some obscure plagiarist of Glanvill foisted upon the law of Scotland.

The truth is that Craig was less interested in the historical antiquities of Scots law than in the establishment of his thesis that the laws of Scotland and of England are fundamentally the same. He was concerned to refute the argument which the opponents of the union of the two countries, then a project of King James I and VI, founded on the dissimilarity of their legal systems. With this object in view he preferred to examine the law and practice of Scotland as he found them rather than to trace their evolution. All the same, there is plenty of history in his pages, not all of it reliable. He instances the forfeiture by Adam of an estate in the Garden of Eden as the first escheat for want of fealty! His division of the history of feudalism into the periods of Infancy, Childhood, Adolescence and Manhood is his best-known contribution to the subject.

If Craig is open to Walter Ross's condemnation for what he did not do, we ought nevertheless to be grateful to him for what he did do in providing us with the first institutional treatise on the law of Scotland. Much of the law which he expounds has now in turn passed into the realm of past history, and no legal historian can afford to neglect him. It is significant, as Mr. George Law points out in his articles on the *Jus Feudale* (*Juridical Review*, x, 177, 334), that as in England Littleton's Tenures is one of the earliest sources of authority, so in Scotland a treatise on the feudal law occupies a similar position. It indicates the preoccupation of the lawyers of those days with the land, then the chief form of wealth. Craig fortunately, however, does not confine himself to treating of the law of heritable property, for he has much to say also about personal law, particularly in relation to succession, but it is always in relation and subordinately to his main theme.

Lord Clyde, who has found in the production of this scholarly translation, with its invaluable index, an occupation—it can scarcely be called a relaxation—for such leisure as his exacting judicial duties have permitted, has added to our indebtedness by furnishing us with an admirable, though all too brief, introduction. But one cannot help regretting that he has not equipped the text with the critical commentary which it invites. The developments since Craig's day have almost obliterated the elaborate formalism of the old feudal law, yet it remains true that in essential theory the real property law of Scotland is still the most consistent feudal system extant. It would have been of great interest if Lord Clyde had traced for us the process of its changes and modernization. It would have been useful, too, to have indicated where later learning has shown Craig to have fallen into error. The *Jus Feudale* is not of merely antiquarian value; it is still resorted to as a high authority on points of feudal doctrine, and has been relied on in several important modern judgments. It was referred to in the House of Lords so recently as 1919, in the famous case of *The Lord Advocate* v. *Marquess of Zetland*, 1920 S.C. (H.L.) 1. Now that Craig's learning has been made available in such accessible form it is to be hoped that the study of it will be revived and stimulated.

As the Lord President says in his "Translator's Note": "It is something of a reproach that a national system of jurisprudence which justly boasts the pre-eminence of its institutional writers should have no historian." Happily there is now some prospect of that reproach being removed. As will be seen from the announcement on another page, it is proposed to establish a Scottish Legal History Society, under the appropriate name of The Stair Society, whose main object, like that of the Selden Society in England, will be to collect, edit and publish the early records which are available and so to furnish the future historian of the law of Scotland with the materials for his task.

MACMILLAN.

SERVITUDES IN THE LAW OF SCOTLAND.[1]

THIS treatise was written as a thesis for the degree of Doctor of Philosophy in Edinburgh University, and its publication is justified as being a careful and interesting study on a subject which has not hitherto received separate treatment. The author has appreciated the importance of a comparative treatment of the subject and of tracing the sources and influences which have affected the law in the course of its development. The most important connexion is with the law of Rome, and the author has, justifiably enough, given some consideration to the vexed question of the date of the "reception" of Roman Law generally in Scotland. As regards the servitudes recognized, the urban servitudes are traced as being in much more close accord with the Roman classification than is the case with rural servitudes. The former were required only when Roman Law had undoubtedly become the dominant influence in the development of Scots Law, for before that the dwellings even of the richer classes were but of a poor and impermanent nature. The rural servitudes, on the other hand, were conditioned by the needs of the country from an earlier time, and, as is shown, owed more to their development from actual forms of tenure in preceding periods, and resembled those of other Western countries. Dr. Ross has taken care to point out the resemblances to and differences from those of both England and France. Historically the most remarkable example of servitude in Scotland was the distinctively feudal right of "thirlage." In France, restriction to a "moulin banal" was not a servitude proper, while in Scotland it was always considered one. Its influence on economic progress, or perhaps lack of progress, there was very great.

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[1] By T. A. Ross, B.L., Ph.D. (Edinburgh: W. Green & Son, 1933.) 5*s*.

The author modestly disclaims any attempt to deal exhaustively with his subject in the limits of the form of his work, but even in a small book the provision of an index would be an advantage.

S. G. K.

SPECULATIONS ON THE CONSTITUTION.[1]

THIS is an extremely acute and suggestive essay, somewhat formless, on the legal bases of Constitutions and schemes of government generally, with special reference to the English scheme. It is difficult to classify it as either a work on Political Science, Jurisprudence, or Constitutional Law; but it is none the less interesting on that account. Some of its suggestions are startling at first sight, *e.g.* the thesis of the Appendix that the famous Rule of Law (especially as expounded by Dicey) is either a myth or a platitude—it all depends on the view which one takes of "Law," or, another suggestion, more than once repeated, that the whole of English Constitutional Law consists of the dogma that Parliament can make any law that it pleases.

Both of these, and similar contentions, ultimately turn on the precise meaning attributed to the terms "Law" and "Constitution," especially where, as in England, there is no Code and no written Constitution. Dr. Jennings is very sound in his view that a Constitution is "an instrument of national co-operation" (p. 72); though, perhaps, it would be truer to say, that a Constitution is an ideal which cannot be realized without national co-operation. This is abundantly clear in the case of "unwritten" Constitutions, where it is possible for any important organ of the State—legislature, executive, or judiciary—by refusing to "play the game," to ride roughshod over the most cherished convictions of the community. Perhaps it was this fact which led Tocqueville to his famous conclusion that the English Constitution "n'existe point." But he under-estimated the unseen force in England of constitutional conventions, about which Dr. Jennings has much that is interesting to say in his third chapter, though we think that he has overlooked one function which they perform, viz. the preparation of the way for legal reforms, for example, in the case of the Parliament Act of 1911.

Perhaps the contention of Dr. Jennings which will arouse most criticism is his evident attempt to belittle Montesquieu's distinction between administrative (or executive) and judicial functions, possibly not without an eye on future political developments which he is inclined to regard favourably. It is true that Dr. Jennings has the support of one of the most distinguished of modern French publicists, M. Berthélemy, the present Dean of the Faculty of Law at Paris. But M. Berthélemy, in departing from the principles of his great fellow-countryman, has the immense weight of the practice of the *ancien régime* and the Napoleonic policy behind him, while English history affords little encouragement for his view. It is true, also, that the judges in England may be said to "administer" or even "execute" the law. But the judicial function is, in essence, perfectly distinct from the administrative; and, though Dr. Jennings insists (pp. 18–20) that the exercise of discretion (the function of the administrator) can never be entirely avoided by a judge, even in coming to a conclusion as to the law, this appears to us to be equivalent to arguing that, because a marksman may miss his target, he has a discretion to do so.

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[1] *The Law and the Constitution.* By Ivor Jennings, Reader in English Law in the University of London. (University of London Press.) Pp. xi + 263. 6*s.* 6*d.* net.

Dr. Jennings is on much surer ground when he argues that judicial and administrative powers are often, even in England, exercised by the same persons. The High Court Judges and the Justices of the Peace are obvious examples; the former, with the development of the Law of Trusts and "winding-up" actions, added administrative to their judicial duties; while the latter, originally executive officials, acquired judicial powers before the end of the fourteenth century.[1] But, in principle, their duties in these two rôles are quite distinct; and it is, surely, almost a "reversion to type" to attempt to confuse them. Progress in law and politics is largely expressed in differentiation of functions, and practical considerations powerfully support biological tendencies.

Again, we think that Dr. Jennings's ingenious theory that the dogma of the Sovereignty of Parliament is due to its acceptance by the Courts after the Revolution of 1688 (p. 35) is a little far-fetched. Surely the dogma owed at least as much to the short-sighted though easily explicable wording of the original Parliamentary writs for the election of knights and burgesses. Persons having *plenam et sufficientem potestatem pro se et communitate* would be likely to take a wide view of their powers, especially after the passing of the Reformation statutes; and it is doubtful whether even James I or Charles I seriously disputed the sovereignty of the King in Parliament, though, naturally, they would not have conceded that the so-called "royal veto" was a mere form.

Scattered throughout Dr. Jennings's book are sweeping statements which require much explanation if they are to be accepted. For example, in a note on p. 51, the author makes the startling observation that (since Austin) "no English lawyer has made any substantial contribution to the study of general public law." It is true that English lawyers are not given to writing systematic works on *Allgemeine Staatslehre*, probably regarding that as not their job. But to ignore the work of Maine, Pollock and Bryce [1] in this connexion is a curious omission. No one who had seriously studied English Law as a whole could have written (p. 36) that "the law which they (the English courts) administer is almost entirely statutory"; for every case of contract and tort involves an application of the Common Law. To say that in a British colony (as distinct from a Dominion) "the Governor . . . still acts according to his own discretion limited *only*" by his Instructions and "the necessity of securing the maximum collaboration from the colonists" (p. 82) is simply untrue; for, in almost every British colony acquired by conquest or cession, there is a substantial residuum of native law which he cannot alter, while, in a settled colony, the settlers are protected by the Common Law. It is very misleading to state (p. 193) that "no proceedings can be brought against the King" without explaining that "proceedings" do not include petitions of right and some other actions which, in fact, are frequently brought to obtain relief against the Crown. Nor is it true to say (p. 197) that no action can be brought against a Crown official on a contract made by him on behalf of the Crown; for there can be little doubt that, if the official expressly or by implication undertakes to make good the contract, he can be sued on it. Dr. Jennings should know that the doctrine of *Poulton* v. *London and South Western Railway*, after too long disfiguring English Law, has at last been overruled by the House of Lords in *Perey* v. *Glasgow Corporation* (p. 199). We gravely doubt whether if Parliament "enacts that smoking in the streets of Paris is an offence" . . . and "a Frenchman who had smoked in the streets of Paris spent a few hours in Folkestone, he might be brought before a court of summary jurisdiction for having committed an offence against English Law" (p. 130) or, at any rate, we doubt whether the court would entertain the case. What about *Carr* v. *Fracis Times & Co.*? It is true that this last was a common law action of tort; but is there any reason to suppose that a different rule would apply in a case of crime? The jurisdiction of the King's courts is based on either allegiance or territory; and, in the case put, neither element is present. No English court would be likely to take a step which could so obviously provoke a diplomatic protest.

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[1] The acquisition of judicial powers by the local justices in England is sometimes ante-dated, largely owing to the mis-translation by the Statutes of the Realm of s. 6 of the Statute of Winchester. The words "quant il vendrunt en pays," omitted from the English translation, clearly show that the itinerant judges are intended. The omission has misled Sir William Holdsworth (*History of English Law*, vol. i, p. 287).

We have little doubt that Dr. Jennings, if he saw fit to make these and similar sweeping statements to an audience of his students, would take care to explain them in such a way as to avoid misunderstanding; and it seems to be rash to allow them to appear in print without taking a similar precaution.

EDWARD JENKS.

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[1] Curiously enough, Dr. Jennings, though much of his book consists of a criticism of Dicey's views on the Constitution, admits that he made "some contribution to the general science."

CONSTITUTION OF THE BRITISH EMPIRE.

MR. E. SALANT has furnished a useful introduction[1] to the study of the constitutional law of the Empire, and he has added greatly to its value by including the constitutions of the Dominions, the Statute of Westminster, and other important Acts. It is unfortunate, however, that his work was prepared too early to include the Status of the Union Act, 1934, of the Union Parliament, which unquestionably is the most interesting outcome of the Statute of Westminster, 1931. It is unfortunate also that the South Africa Act, 1909, should have been reprinted without the numerous and important amendments passed by the Union Parliament. In the case of the Irish Free State the more effective course has been followed of giving the Constitution as revised up to date.

The introduction on the whole will be found helpful by students, but is not altogether to be trusted in point of detail. Thus, it is not the case (p. 18) that judicial appeals prior to the creation of the Judicial Committee were heard by members of the Council with legal experience; it is clear that they were dealt with on broad general grounds and that a strictly legal review was of slow development. Nor under the Judicial Committee Act of 1844 is special leave necessary for every appeal from a court in a territory which is not the final Court of Appeal therein; New Zealand offers a standing example to the contrary. The alteration of the composition of the Judicial Committee as regards Indian representatives by the Judicial Committee Act, 1929, has been overlooked (p. 19), as has also the removal of any limitation on the number of Dominion judges who may be members by the Administration of Justice Act, 1928. Further, it is the Act of 1844 rather than that of 1833 which has hitherto stood in the way of the abolition of the appeal from Oversea territories. The cases of Picton and Wall (p. 17) are not quite accurately stated, and should have been supplemented by a reference to the liability of British subjects accused of murder or manslaughter overseas under the Offences against the Person Act, 1861. It should have been noted that the constitutions of Malta and Cyprus are suspended indefinitely. Moreover the constitutional referendum on changes of the Irish constitution has been suspended to 1938 and is not at present in operation (p. 92). The discussion of certain features of the Canadian and Australian constitutions is interesting, but the vital amendment of the Commonwealth constitution, s. 105A, is overlooked. Necessary as it was on financial grounds, it involves an immense inroad on State constitutional authority. It is perhaps unfortunate that the distinction between protectorates and protected States[2] has not been drawn, and while the decision in the Urtas Springs Case is not incorrectly given (p. 100), the more important point is passed over, namely that it lies primarily with the mandatory power to determine what acts are within the mandate and that a court cannot substitute its discretion for that of the executive. The case was a victory for the executive, not the courts.

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[1] *An Outline of the Constitutional Laws of the British Empire.* By E. Salant, LL.B. (London: Sweet & Maxwell, 1934). Pp. viii + 239. 10*s.* 6*d.* net.

[2] See Ridges, *Const. Law of England* (ed. Keith), pp. 570–3.

A. B. K.

INSANITY AS A DEFENCE IN CRIMINAL LAW.

THIS book[1] is the result of a study of all the legal material including especially all the available cases in the United States applying to the laws which relate to insanity. It cites the exact number of jurisdictions which support each rule and traces the historical development of the rule first in England and afterwards in each American State. It contains, therefore, a scientific and systematically planned study of a type that should be definitely useful in a matter where discussion has often lacked these scientific and systematic qualities.

It can be said at once that the American law is very similar to the English law and is historically derived from it.

The practical import of a study like this lies in the well-known difficulty which exists with regard to the laws of responsibility in the insane. It would be of much interest and value if someone would collect a supplementary study of the cases where in this country insanity has either been pleaded or has emerged importantly at any time during the trial or after sentence. It is conceivable that as the result of safeguards, such as the wisdom of judges, and the latitude allowed to their discretion in their directions to the jury, and the commonsense of the latter, there may be but little ultimate hardship. If this is so it would be satisfactory to have it demonstrated by such a systematic survey as I have suggested; for as the law stands in England, and indeed in most of the United States, it arouses the most lively uneasiness both as to principles and procedure in the minds of those who approach the problem primarily from the angle of a knowledge of the principles of human conduct. It must sometimes happen, and it has sometimes happened, that medical witnesses are obliged to commit what seems to them almost to be perjury in order to bring expert evidence into line with what they, and probably the court, recognize to be the truth; and this predicament seems to arise mainly out of the wording of the present rules. In America, as in England, the principal criteria remain the M'Naghten rules. In 29 States of the Union they are still the only test; in the others they are still the main test, supplemented by the irresistible impulse test.

This book gives a list of the objections that have been raised to these rules as they stand. The objections are formidable, according to the author, on the legal side, in the sense both of circumscription in the original terms of reference which the judges had allotted to them in the M'Naghten case, and in the sense also of the verbal ambiguity of the rules themselves.

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[1] By Henry Weihofen. (London: Humphrey Milford, Oxford University Press.). Pp. xi + 524. 16*s*. net.

The very number of the transatlantic legislatures gives opportunity for a great variety of ways in which the rules can be interpreted. Here, on this side, interpretation is much more likely to be consistent for that and other reasons, and yet as late as 1916 the Court of Criminal Appeal in England found it necessary to construe the meaning of the words "nature and quality." Nevertheless, miscarriage has been rare.

But the objections from the aspect of medical fact are much more important. There are four large groups of mental diseases of severe degree where the person suffering from them recognizes the nature and quality of his act and that it is wrong. No less an authority than Sir James Stephen went so far as to say "Persons so insane as not to be aware of the wickedness of their act are so rare as to be practically unknown." It follows then that if the M'Naghten rules are to be exactly applied, a very large proportion of persons suffering from mental diseases are likely to be excluded from the clemency of their operation. There is, for example, the depressed parent who, while perfectly clear in his understanding and knowing well that it would be considered wrong legally and morally by others, kills his children and then himself because he feels incapable of facing the world and is overwhelmed with anguish at the prospect of leaving those whom he loves to face it alone. Or there is the youth with *dementia præcox* who kills his father because he feels he must do so, although he can give no reason and is perfectly cognizant of his own action and of how it will be construed by ordinary people.

Another point of importance, as Weihofen points out, is that the judges who framed the M'Naghten rules definitely had the case of M'Naghten himself in their minds. Now this was a case of paranoia, which is an example of a condition in which logical reasoning is sustained. It is only that in some manner the premises are wrong. The judges found nevertheless that he must be considered in the same category of responsibility as if the facts in respect of which the delusions existed were real.

As Weihofen points out, this seems to judge an insane man by the same standards as a sane man, or in other words the law accepts the delusion but requires him to reason about it as if he were sane. It has been remarked that a lunatic on this basis will not be held liable for his acts so long as he acts with reasonable propriety.

The scientific fallacy resides in the fact that it is impossible to isolate a piece of the mind in this way. The doctrine of partial delusion or monomania has been abandoned—not because of a change in fashion but because of an accumulation of facts. It is essential that the law should take cognizance of facts, which in science are always unfolding and developing, whereas the accretions which constitute legal tradition tend all the other way, crystallizing and stereotyping a limited set of rules and definitions which have been laid down in the past.

As regards the irresistible impulse test, which has never been admitted in this country, here again it seems it must be a question of fact. A leading judicial exposition of the irresistible impulse doctrine quoted by Weihofen is apparently the opinion of Judge Somerville in *Parsons* v. *State* (1886) 81 Ala. 577, 2 So. 854.

" If it be true," he said, " that as a matter of fact mental disease can so affect the mind as to subvert the freedom of will and thereby destroy the power to choose between right and wrong—although he can perceive it—a person so afflicted is not responsible criminally for an act done under the influence of such controlling disease. The question whether it be true in fact that insanity may have this effect in subverting the will," said Judge Somerville, " is one of fact and not of law. The question is a scientific one for experts and the truth of their testimony concerning the existence of such disease in each case is a question for the jury." Although made fifty years ago, this is a recommendation which is well in accord with knowledge of the subject now.

Expert evidence raises problems of its own. There has been an attempt to exclude physicians who are not shown to have made any special study of insanity as incompetent to render opinions on the subject, and such rulings have been upheld in the discretion of a higher court. This raises a point of some importance. It must be difficult for a jury to assess the relative value of the evidence given by those calling themselves experts. It is not unknown for persons to appear as expert witnesses whose qualifications are actually, from the medical point of view, mainly of another kind. It is possible that this misfortune may be avoided by the provision made in a number of States, namely New York, Rhode Island, Vermont, and Colorado, where there is a rule for the appointment of experts by the court itself. Weihofen points out that there should be no historical objection to this practice. On the contrary expert witnesses were regarded by the court formerly as *amici curiæ*.

The alternative method which has been used is the enactment of a statute to provide for the commitment of accused persons to an institution for the insane for a period of observation.

Louisiana has sought to go still further and to eliminate judicial proceedings entirely wherever possible. In Louisiana the defendant, if he enters a plea of not guilty by reason of insanity, is first examined by a commission of experts. If this commission finds that he is mentally irresponsible he is forthwith committed to an institution for the insane and no judicial trial is necessary. If the commission decides that he is responsible, the defendant still retains the right to submit that issue to a jury. Weihofen remarks that the social efficiency of such a procedure, especially where the person is clearly irresponsible, is obvious.

The reforms suggested in Weihofen's book are mainly as follow :

Quoting from Glueck he says there should be a psychiatric clinic in connexion with the municipal courts. In New York City a psychopathic clinic has been established in connexion with the police department which assures the proper disposition of a steady stream of mentally abnormal persons who visit police headquarters to make complaints. There must be room for such a department at Scotland Yard, for example, but Dr. Glueck would like clinics attached to the municipal courts as well, especially in aiding the proper disposition of "repeaters" and deciding upon the wisdom of admission to bail of serious offenders before a more thorough mental examination by experts. Already in Massachusetts Brigg's Law achieves something very similar to Dr. Glueck's recommendation. Whenever a person is indicted who is known to have been indicted for any other offence more than once or to have been previously convicted of felony, notice is given to the Department of Mental Diseases. This Department then examines the person by having him admitted to a psychiatric hospital. It is pointed out that this does not make the detection of mental disease a matter of mere chance. Magistrates are sometimes heard to claim that they can see from a prisoner's face whether he is mentally sound or not. This is more than the most expert in these matters can do, and the Massachusetts custom of examining every indicted person coming in certain classes, whether anyone thinks he is insane or not, is much safer. Furthermore, the examination is carried out by independent experts who have a correspondingly high standing in the Massachusetts court. The usual criticism that is urged against such procedure is that the psychiatrists will overstate their case and claim too much and make everyone a mental case. Another objection urged is the likelihood of the opposition of counsel for the defence. This question, like many others, can only be answered by seeing how the procedure works in actual practice. It has been found that defendants' counsel have co-operated to an extent that even the most hopeful supporters of the law had not expected. It has been very rare for counsel to raise objection to having clients examined by the Department's experts. Furthermore, counsel have in almost every instance recognized the fairness of the examiners' reports and have not attempted to contradict their findings by putting other experts on the witness stand. The Department's report is usually accepted by both sides and no other expert testimony is produced. What a blessing that would be felt to be by doctors who from time to time are called on to appear in these cases can be imagined.

Weihofen makes a plea for treating the criminal from the point of view of reform if possible rather than of punishment. He does not mean by this that all unpleasant forms of dealing with criminals should be abolished. No doubt there are cases in which disciplinary measures are necessary and beneficial. There are many instances in which a radical psychological viewpoint would lead to a longer and not to a shorter incarceration than results from the existing law. The point, says Weihofen, is that the criminologist would inflict hardship and suffering only in so far and in such cases as it would tend to confer a benefit and not for their own sake. At present the older methods based on the theory of punishment as retaliation exist alongside newer methods which regard crime as a social problem calling for reconstructive treatment. The newer attitude does not make the task easier. Determination of guilt and commitment to prison are far simpler matters than the accurate ascertainment of the causes that have been at work and the planning of methods of reform and the carrying of them out. In fact the difference is analogous to that which exists between diagnosis and treatment; diagnosis has nearly always been in advance of treatment. Diagnosis is hard enough; but efficient, technically unimpeachable treatment is a far harder task. The society of the future will increasingly regard the ascertainment of guilt and commitment to prison as but the first and perhaps the least difficult step in a programme of rehabilitation.

R. D. GILLESPIE.

THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE.[1]

THIS is a publication by the Graduate Institute of International Studies of Geneva of lectures delivered at that Institute by the author under the auspices of the directors, MM. Mantoux and Rappard. The title of the book well describes the general nature of its contents, and the contents fulfil the hopes raised by the title.

The author, *amicissimus curiæ*, has set himself, as he tells us in his preface, the task of "examining the principal tendencies which have distinguished the work of the Court and which permit some forecast as to the temper in which it is likely to approach future cases." The result is a short book (and most good books are short) of great value which should be in the hands of every student of international law. The keynote of the book is the fundamental importance for international law of the work of the Court; the author devotes an acute and friendly examination to the performance by the Court of its task.

Early in the book the sound protest is made that in the present stage of international organization—and, we might add, in the present state of international sentiment—"codification must be left out of account as an effective means of developing international law." The author would perhaps not too deeply deplore this failure of codification—for codification is apt to smack too much of positivism and State sovereignty, but in any case the result is that the development of international law rests very largely with the Permanent Court. This must mean, whatever Art. 59 of the Statute of the Court may say, that the decisions of the Court, almost inevitably accepted by the States immediately concerned, will possess the value of precedents; they will be stones in the growing edifice even if in theory the builders are free not to continue to build upon them. The English doctrine of the binding force of precedent is, it is true, no part of international law, but no tribunal can with due regard for its own authority habitually neglect its own previous decisions; a court of law cannot, as someone has picturesquely put it, "exchange the red robes of the judge for the white sheet of the penitent." Dr. Lauterpacht has some admirable pages on this aspect of the work of the Court. The Court is the main hope of international lawyers; *extra curiam nulla salus.*

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[1] By H. Lauterpacht, LL.D., Dr. Jur. Dr. Sc. Pol. (London: Longmans, Green & Co.) Pp. viii + 111. 6*s*. 6*d*.

A good book of this kind is a thought-provoking book, and it is in no wise to depreciate its merits to suggest that approval must sometimes be tempered with caution. The author seems at times to carry to an extreme his dislike of the doctrine of State sovereignty, and is ready to see a manifestation of that doctrine in everything that threatens the better development of international law. But if for the now rather obnoxious term "sovereignty" we substitute "independence" or even "liberty," the need for caution is apparent. For the free exercise of the sovereignty or independence of one State usually means the restriction of the sovereignty or independence of another; a claim by State A to punish a national of State B for a crime against the law of State A committed in State B's territory means an inroad upon State B's sovereignty by the competing sovereignty of State A. If the one sovereignty is increased the other is diminished. The point at issue cannot be decided upon a general presumption against State sovereignty. The appeal must be to the general practice of the civilized world and to the recognition of law as being in one of its aspects the guardian of liberty; not all lawyers will be in agreement that in the *Lotus* case (where the Turkish Government claimed criminal jurisdiction over a French national for careless navigation on the high seas of a French ship resulting in collision with a Turkish vessel and death by drowning of a Turkish national), the Permanent Court, being in substance equally divided, acted wisely in seeming to accept a principle that, if not carefully limited,[1] might easily be dangerous to the freedom of individuals—the principle that a State may assume jurisdiction over aliens in respect of acts done abroad. And the hesitation to applaud the action of the Court in that case will be increased when it is realized that the acceptance of the principle was on the Court's own showing not necessary for arriving at the decision actually reached.

Perhaps the most controversial part of the book is that in which the author discusses the use of preparatory work, *travaux préparatoires*, in the interpretation of treaties. The Court may be represented as having not been wholly consistent with itself in the treatment of this question. It has given a general support to the Anglo-Saxon doctrine as to the inadmissibility of preliminary drafts for the interpretation of a written instrument, at any rate in cases where the written instrument itself is "clear," but at the same time it has developed an unfortunate habit of fortifying an interpretation of a treaty which it finds to be "clear" by an examination of the preliminary work. The sympathies of the author seem to be with those who would examine the preliminary work, even perhaps when the language of the treaty might be thought to be "clear." The reviewer finds it difficult here to follow the author. Even if it be true on a strictly logical analysis, as the author says, that "a phrase or word is never 'clear' in itself"—for clearness is relative to the mind of the hearer or reader—nevertheless the Court, when it speaks of language being "clear," must be taken to claim to put itself in the position of the ordinary reasonable man, and to estimate whether to the mind of such a man the language used possesses normal "clearness."

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[1] "According to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships and to crimes by its own nationals wherever committed," see *In re A Reference under the Judicial Committee Act*, 1833, and *In re Piracy Jure Gentium*, before the Judicial Committee of the Privy Council, July 26, 1934, reported (at the time of writing) in *The Times* newspaper of July 27, 1934.

Once, then, the Court reaches the conclusion that the language is "clear," an examination of preparatory work must have the result either of introducing obscurity or even contradiction where there was clarity—which is to destroy a definite and intelligible result reached, in the view of the normal hearer or reader, by the parties—or of confirming the existing "clear" meaning—which is unnecessary labour.

The reviewer, indeed, feels some doubt whether, even when the language is not clear, a resort to preparatory work is justified. For the absence of clear language may be the result of the deliberate, final intention of the High Contracting Parties. In such a case to introduce clarity and definiteness is to contradict the intention of the Parties. They may have deliberately resolved to pass "between the Scylla of Aye and the Charybdis of No by the channel of no meaning." If so, why force the ship out of its deliberate course?

There seems to the reviewer to be two strong, if not fatal, objections to the use of preparatory work. First, there is no assurance that when the final document departs from the result of earlier negotiation, the departure is not intentional. And, second, what is of supreme importance for documents of international importance, the preliminary work forms no part of the result finally published to the world, and disclosed to the ratifying authorities—at any rate, in most if not all cases where that authority is parliamentary—of the treaty-making Powers. The preliminary work is not registered under Art. 18 of the Covenant. Even if it be sometimes or often true that the intention of the negotiators is best revealed in the preliminary work, it is a bad thing that there should be a sort of esoteric doctrine as to the meaning of a treaty, something known only to the learned—and not always to all of them—and hidden from the world at large. For private contracts Continental doctrines—or rather the Continental absence—of the law of evidence may be scientifically defensible. And for such documents the Anglo-Saxon doctrine of rectification—unknown to international law—has its place. Private contracts concern mainly those who have negotiated them and who are usually the parties to them. Treaties are on a different footing. The negotiators are transient individuals; the parties are nations, and partake of long time if not of eternity. And often the High Contracting Parties are not alone concerned. Other nations, as in the case of the Covenant of the League and of many conventions negotiated at Geneva, are invited to adhere. Their adherence is or must be to a definite document, not to a series of unpublished archives. In the view of the practical lawyer, the fire is surely the proper place for the contents of the diplomatic waste-paper basket.

This question of the *travaux préparatoires* has the special importance that it is generally accounted the chief point on which Anglo-Saxon legal principles are in conflict with the principles accepted by nations trained in law on Continental lines. The reviewer agrees with the author that much of the talk of the importance in the international field of the difference between the two main systems of law is not always well-informed, and is often tainted by exaggeration. It is true as the author points out—and he is not alone in this observation—that in no decision or opinion handed down by the Court have the Anglo-Saxon judges stood on one side alone, confronting the remainder of their colleagues. This is a solid and a comforting fact. But where English practice differs, and differs in the view of many competent people for the better, from what seem the looser methods of Continental jurisprudence, it is not well that the Court, having made great progress towards the acceptance of the Anglo-Saxon view, should give signs of a willingness to retrace its steps.

Enough has perhaps been said to indicate the high interest of the matter treated in Dr. Lauterpacht's book ; indeed, it is full of matter tempting to the discursive pen of a reviewer : the student will find in it discussions of the attitude of the Court to the doctrines of "*rebus sic stantibus*," abuse of rights (where the author is perhaps a little hard on the legal system which not so very long ago produced the decision in the case of *Pickles* v. *The Corporation of Bradford*), unanimity under the Covenant of the League, and the question of domestic jurisdiction. On all these topics Dr. Lauterpacht has something of interest and value to tell us. The reader will close the book with a better understanding of the work of the Court, and a high appreciation of its unique value and high merits as the one existing permanent institution for the development of international law.

J. F. W.

PRIVATE INTERNATIONAL LAW.

THIS is the second part of Professor Arminjon's remarkable treatise on private international law,[1] which is now in its second edition and will comprise three large volumes. The whole work has been entirely recast and greatly increased from the original form in which it was contained in two comparatively slender volumes. The present part comprises the subjects of persons, goods, juridical acts and contracts.

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[1] *Précis de Droit International Privé.* II. *Les Personnes, les Biens, les Actes Juridiques et les Obligations.* By P. Arminjon. Second Edition. (Paris : Librairie Dalloz, 1934.) Pp. 610.

Professor Arminjon, who was for many years in Egypt, where he held successively the posts of Professor of International Law at the Royal School of Law and Judge in the Mixed Courts, has made an important contribution to the science. It is probably his long experience in Egypt, where questions of private international law arise more frequently and more dramatically, so to say, than in almost any other country, which has led him to take an independent line from that of the French masters of the subject. Whereas they seek to build up a logical structure from certain fixed principles, with little regard for the practice, and frequently with scorn for the judicial decisions, he is concerned to lay down a positive system of rules which correspond with the realities of the case, and which are actively supported by the authority of the courts. He says of the work of his fellow-countrymen and others: "Most of their treatises are conceived as a report on some scheme of a code designed to serve as a law common to civilized states, and the authors have nearly always drawn their arguments *de lege ferenda*." Against that view he urges that the rules of this branch of law are not designed to resolve conflicts of legislation or judicial competence. They have rather as their aim to give a just and lawful solution to questions which appear to be attached to two or more systems of law. The science, as he sees it, deals with the *règles de rattachement*; and he excludes from it questions which are often included by other writers, such as the laws about nationality and the rules which determine the nature of an act: *règles de qualification*. On the other hand, he proposes to include rules as to judicial competence in criminal as well as in civil matters.

He realizes the immense amount of detail which would be involved in a complete statement of the rules of jurisdiction and competence which should govern every question of conflict of laws that may arise. That would involve a Code at least equal in length to the Code of "Internal" Law. But he realizes also that the moment has not yet come for drawing up such a Code, and he restricts himself to dealing with those matters in which rules of conflict have been formulated. Naturally he takes the French Code and the French authorities as the basis of his treatment; but he is master of the literature of other countries, and is prolific in his references to foreign Codes and foreign, including English, text-writers and jurists. He seeks to give a reasonable solution for each case. One may not always, indeed one may not often, agree with his conclusions, but one is forced to recognize that there is always a genuine attempt at a solution.

Professor Arminjon adopts in great degree the standpoint of the English writers on Private International Law, such as Dicey and Westlake, in that he is concerned to formulate an exact rule based on legislation or judicial decision for each particular topic. On the other hand, his differs from the English treatment because he does not give the particular case or set out the finding of the court in the particular circumstances, but is rather concerned to extract a general rule. To the English mind, therefore, his treatment, though actual, is not actual enough. Nevertheless, for all who are concerned in the science of the subject, his work is valuable, and, indeed, indispensable. In his references to the English doctrines and cases, he is not always up to date. Thus, in dealing with the question of the *Renvoi*, with regard to the establishment of domicile according to English ideas, he refers to the famous case of *re Johnson* decided by Lord Justice Farwell in 1903; but apparently has not noticed the recent decisions in *re Annesley* and *re Ross* which have thrown doubts on a part of the earlier judgment. And it is noticeable that he refers to the first edition of Dicey and the third edition of Westlake's Private International Law, whereas there is now a fifth edition of the one and a seventh edition of the other textbook; and remarkable developments have taken place in many aspects of Private International Law as developed by the English courts. We notice, too, that he refers to an English Foreign Marriage Act of 1862, when the reference should be to the Act of 1892, and he mistakenly thinks that that Act defines marriage as the voluntary union for life of one man and one woman, whereas that definition of Christian marriage occurs not in the Statute but in a judicial decision. Trusting to the old authorities also, he states that the English law does not admit the right of adoption, and has not taken account of the Act of 1926. Yet these minor defects do not seriously touch the value of the treatise which marks a new standpoint in the Continental doctrine. They will no doubt be corrected in a third—we may hope not a still further enlarged—edition which is to be expected from the indefatigable author.

NORMAN BENTWICH.

INTERNATIONAL CONSTITUTIONAL LAW.

THIS is a valuable monograph [1] which, notwithstanding its topical interest, raises a number of questions of permanent importance for international law. The object of the book is to discuss the provisions and problems of constitutional law in so far as they bear upon international law. Such direct relation is established in the first instance where the constitution of a State is placed under an international guarantee, *e.g.* in the case of Greece as the result of treaties of 1830 and 1863, of Danzig, and of the Memel and Saar Territories. The author then analyses the various aspects of conclusion of treaties, in particular in relation to the constitutional limitations upon the treaty-making power. He then surveys the constitutional provisions referring to the protection of the rights of the individual and of minorities and enacted in pursuance of international obligations. He discusses the international protection of individual rights, and in this connexion draws attention to the provisions of some Latin-American constitutions which limit the responsibility of the States in question in regard to aliens. Part II of the book is devoted to constitutional questions in so far as they affect peace and war. They include the limitations upon the right to declare war and the renunciation of the right of war as an instrument of national policy—a provision embodied, *inter alia*, in a decree of the French Convention of 1791 and in Art. 6 of the recent Spanish Constitution. The author then gives an account of the proposals to embody in the municipal law provisions against war propaganda.

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[1] *Droit constitutionnel international.* By B. Mirkine-Guetzévitch. (Librairie du Recueil Sirey, Paris, 1933.) Pp. 298.

The book contains an interesting account of the attempts made in some countries to incorporate as part of the municipal law the obligations of States in the matter of enforcing the Covenant of the League. A Czechoslovak law contains detailed provisions in the matter of military and economic sanctions, and a French law of 1927 on the general mobilization of the army refers to the " mobilization of the nation in a capacity determined by the Covenant and the decisions of the League of Nations." These provisions are of special interest at a time when in this country proposals are being put forward for a " Peace Act of Parliament " intended to incorporate the obligations of the Covenant as part of the law of England.

Professor Mirkine-Guetzévitch is an adherent of what he calls the theory of the unity of public law. One of the consequences of this theory as he sees it is that the progress of international law and the organization of mankind on the basis of law are only possible between free peoples associated under democratic constitutions. This was the idea of the French philosophers in the eighteenth century. It was fully taken over by Kant in his exposition of " Everlasting Peace." Modern international lawyers like Oppenheim identified themselves with the same view. The author thus certainly finds himself in good company. The position of Europe and of the world in 1934 is not necessarily a refutation of this main theme of a suggestive book.

H. L.

NATIONALITY.

" STATELESSNESS " is a very important branch of a very important subject, which hitherto has not received the attention of legal writers that it deserves. Therefore, it has been well chosen as the first of " The American University Studies in International Law and Relations " to be prepared and published as part of the Cumulative Digest of International Law and Relations at the request of the Department of International Law and Relations of the American University Graduate School.[1]

The careful treatment, which the importance and intricacy of the subject demand, has been admirably applied by Dr. Seckler-Hudson in

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[1] *Statelessness : With Special Reference to the United States.* By Catheryn Seckler-Hudson, Ph.D. (The Digest Press, 1934.) Pp. xxi + 332.

Statelessness. The arrangement of the subject-matter is logical and convenient. The six chapters of the book fall naturally into three groups: (1) Chapter I, which is a general introduction; (2) Chapters II, III and IV, which deal with statelessness, as a result of marriage, of adults not resulting from marriage, and of minors, respectively; (3) Chapters V and VI, which outline the consequences of, and possible cures for, statelessness.

The reader will observe that, from the point of view of the United States, there are approximately eighty-six sets of circumstances causing statelessness, and, when he considers that among these are such cases as that of an alien woman who, upon marriage to a citizen of the United States, may lose her foreign nationality, though she will not thereby acquire the nationality of her husband, and that of a former Russian, who happens to be so unfortunate as to have fallen within the clutches of the wholesale denationalization of 1924, he will realize how widespread is this disease of statelessness. He will also find that the problem is further complicated by the fact that a man, technically the subject of a certain State, may be without any " effective nationality "; such is the case of the man who, though born of " American " parents, is unable to produce satisfactory proof of his identity or of the citizenship of his parents.

Yet, complicated as the subject is, it may be regretted by some that it was not extended so as to include " double nationality." Perhaps such extension might have led to confusion, or have increased the bulk of the book unduly. Nevertheless, it should be remembered in reading the book that " statelessness " and " double nationality " go hand in hand, because in practically every case where statelessness arises inversion of the conditions will lead to dual nationality. Furthermore, it is scarcely a practical proposition to consider ways and means of avoiding statelessness, without considering ways and means of avoiding double nationality. Indeed, it may be fair to observe here that if any part of Dr. Seckler-Hudson's book is weak, it is the part in which she propounds her solutions. Of course, this is not a serious defect, as they are put forward very tentatively; but who will agree with her that the ideal solution, by international agreement, would be to make the *jus soli* the one supreme rule for the determination of nationality by birth?

The purpose of the book is to analyse, criticize and propose, with special reference to the United States, and this purpose is achieved with extraordinary skill. Moreover, the wealth of illustration, with references to the laws of many countries, will make this book of interest and value to all who may desire some solution of the glaring nationality problems which face all States to-day. To teachers and practitioners it will be useful as a source book, especially by reason of its index, extensive footnotes and remarkably clear summaries of the conditions under which statelessness arises.

F. A. V.

PROCEEDINGS OF THE MARYLAND COURT OF APPEALS, 1695—1729.[1]

THIS imposing volume, which inaugurates a series of American legal records, to be edited and published under the auspices of the American Historical Association, presents a most interesting view of the proceedings, both at Common Law and in Equity, of the Court of Appeals of the province of Maryland, over a period of thirty years at the beginning of the eighteenth century. Its value is much enhanced by the illuminating introduction contributed by the editor, Chief Judge Bond (the present head of the Court to which the records chiefly relate). As Judge Bond observes, " The number of judicial records left by the early Maryland colonists, and the amount of judicial business recorded in them, may surprise those who suppose that pioneers and frontiersmen in all times and places tend to become independent of the law. For it seems to be demonstrated that, removed as those people were from the environments of their civilization, and relaxed as that civilization must therefore have been in some degree, they were nevertheless tenacious of regulation by law, and prone to litigation. They brought with them the valuation that the time placed upon written records, and the result is that in the public buildings of the State and its counties there are still stored accumulations of manuscript folios and papers, of a large sum total, in which the daily work of the several courts of justice from the organization of the settlement is set down."

It is interesting to learn that the original charter granted to the " proprietor " of the province purported to invest him with all the " Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Immunities and Royal Rights, and Temporal Franchises whatsoever, as well by Sea as by Land . . . as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used, or enjoyed." Another curiosity is that it was held that the Statute of Quia Emptores was not in force in the province ; with the consequence that the Proprietor could, and apparently did, create manors with manorial courts and view of frank pledge. It would be interesting to know if any traces of the manorial system survive to-day in the law or customs of Maryland.

It is instructive to learn that when the governor and his council definitely assumed the position of an upper house of the assembly, the colonists assumed that as a matter of course this body must, like the House of Lords, be invested with an appellate jurisdiction. We learn that there are " many evidences of a substantial supply " of law books in Maryland at the end of the seventeenth century. The courts were required to keep at hand copies of Dalton's *County Justice*, of Hales's *Pleas of the Crown*, of Hawkins's *Pleas of the Crown*, of Nelson's *Justice*, and of the English Statutes. In a series of opinions given to the governor by members of the Bar in 1696 as to the law relating to attaints we find citations (*inter alia*) of Fitzherbert, of Rolle's Abridgment, and of Doctor and Student. A passage from one of these opinions, that of Mr. Charles Carroll, is sufficiently picturesque to deserve quotation. "And I am further of Opinion (though it be somewhat beside the Quaese) that in this Countrey there ought to be a greater latitude allowed in assigning of Errors, and the merits of the Cause to be more inquired into by the Judges before whom an Appeal or Writ of Error is brought, than in England; Because some of our Judges and some of our Juryes (which for want of knowing, and more conscientious men must of necessity be made use of) do oftentimes Judge according to the Affection or disaffection they have for the person plaintiffe or Defendent, and not according to the Merit of the Cause or the Law that Arises upon the pleadings thereof. This I should not have the confidence to Averr, had I not been an Eye Witness and a hearer of Matters which make it evident; for which digression from the Quaese, I humbly beg your Ex$^{\text{ncies}}$ pardon."

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[1] Edited by Carroll T. Bond, Chief Judge of the Maryland Court of Appeals, with the collaboration of Richard B. Morris, Assistant Professor of History in the College of the City of New York. (The American Historical Association, Washington, D.C., 1933.)

M. S. A.

LEGAL PHILOSOPHY.

THIS volume [1] is the outcome of a course of public lectures delivered at the London School of Economics in 1932. Their object was to make available for students some of the ideas which legal philosophers have expounded in recent years. The interest they aroused can be readily understood, and the legal public can only be grateful for their appearance in book form.

It is only too true that there is no adequate literature, in English, on modern legal philosophy. But that this should be so is not altogether surprising. It is nobody's business. This situation may be no worse than that in Germany, where Larenz, writing in 1931 on modern theories of Law and State, deals with over one hundred post-war German works. But fortunately this vast and controversial literature need not worry the German law-student. Though, as I believe, attendance at a course in legal philosophy is always necessary, nowhere is he required to pass an examination in the subject.

To the neglected English student, however, this book will be very useful. Not that it can be regarded as an adequate introduction to modern legal theory. To make it such, a lengthy introductory portion would be necessary, relating the different lectures to each other, and giving them their proper perspective in a consistent scheme of legal science. It would be necessary, for instance, to note that Dr. Meyendorff, in his lecture on Leo Petrazycki, is apparently translating *Recht* and *positives Recht* [or their Russian equivalents ?] by the terms law and positive law, whereas it is submitted, with Westlake's authority, that the epithet positive adds nothing to the meaning of the English word law. Duguit's "droit" also would seem to be a wider concept than our English "law." It is easier, however, to point out sources of confusion than to suggest a remedy.

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[1] *Modern Theories of Law.* Ten public lectures delivered at the London School of Economics during the Lent and Summer Terms of 1932. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 229. 8*s*. 6*d*. net.

The lectures fall into different classes. Professor Goodhart, in "Some American Interpretations of Law," deals with a national tendency to assume universal validity for conclusions about law based on the function of the judge in a particular system. Other lectures deal with particular theorists or particular theories. Professor Ginsberg, in treating of "Stammler's Philosophy of Law," mentions Stammler's *Rechtsbegriff* (concept), but concentrates, wisely, on his less difficult *Rechtsidee* (ideal). Dr. Lauterpacht's lucid account of "Kelsen's Pure Science of Law" supplies a long-felt need, and must be singled out for special praise. The appended bibliography of Kelsen's chief works has proved most useful to the reviewer, and might profitably have been imitated. The lectures of Mr. Robson and Professor Manning are revaluations of Sir Henry Maine and Austin, which bring out clearly the difference in the aim of these two giants—Maine seeking the historical origins of law and the history of specific legal rules; Austin seeking a criterion to enable the student to determine the province of his subject and rigorously exclude extraneous matter. Professor Manning's thesis that Austin's sovereign is "a concept of abstract social statics," and not a sociological reality, might surprise Austin, but Professor Manning would be prepared for this.

Mr. Ivor Jennings, who edits the volume, deals with Maurice Hauriou's "Institutional Theory." In "François Gény" Mr. Wortley makes some interesting comparisons between the theories of judicial interpretation which exist in this country and those which M. Gény would like to see operative in France. Professor Laski is in his element in treating of "M. Duguit's Conception of the State." Sir Maurice Amos, in an excellent appreciation of "Roscoe Pound," has some interesting comparisons to make between the study of law in English and American Universities.

This is a stimulating little volume. A co-ordinated assault by this strong team on special problems of legal philosophy would be of real value.

B. E. K.

EXTRADITION.

THE first thought which strikes one upon seeing this well-produced and carefully edited volume[1] is, that if one of the lesser dependencies can produce such a necessary work, why cannot the home country manage something like it? The learned editor notes the paucity of English books on the subject; there is, indeed, none which is not hopelessly out of date, except a departmental manual not available for public use.

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[1] *A Manual of the Law of Extradition and Fugitive Offenders applicable to the Eastern Dependencies of the British Empire.* By Aloÿsius de Mello. (Singapore: at the Government Printing Office.) $17.50.

The editing of the book is disclosed as careful and accurate, but there is a curious mistake or series of mistakes in the list of countries (p. 12) having an express provision prohibiting the surrender of its own subjects by either State. In this category are included Cuba, Denmark, Finland, Latvia, Portugal and Uruguay, but reference to the treaties shows this inclusion to be incorrect. It is rightly observed that the Belgian treaty says that though the parties are not *bound* to surrender their nationals, yet in the case of *Galwey* (1896) 1 Q.B.D. 230, duly noted on p. 353, it was held that the provision in the treaty implied that the parties *might* do so. The same " be bound " clause occurs in the Finnish and Latvian treaties, and it is subject to the same interpretation. The Cuban treaty is to the same effect, save that " obliged " replaces " be bound." The Portuguese treaty of January 1932 (substituting a new provision for Article III of the old treaty) has " be compelled " and the same interpretation applies.

The Danish and Uruguayan treaties do indeed " except " the subjects of the contracting parties. In the former treaty it is said they " shall deliver up any persons except " ; in the latter they " engage to deliver up all persons excepting " ; the exception being in each case for their own subjects. It is submitted that this does not prohibit delivery of subjects, and that if these two treaties ever come before the High Court for interpretation, the case of *Galwey* will be held to be in point. Where there is actual prohibition it is definitely expressed thus, " No German shall be delivered up."

In some treaties a distinction is drawn between native-born and naturalized subjects, but it is unnecessary to discuss the point further.

The reviewer does not pretend to have read every word in this lengthy volume, but he has done enough to satisfy himself that although he has happened on one statement the accuracy of which he feels bound to question, it is, in general, a reliable manual, and he congratulates its editor on a good piece of work.

A. L.

DISARMAMENT AND THE LEAGUE OF NATIONS.

It is encouraging that, while the German Government has given notice of its intention to leave the League of Nations, Germany is still anxious to define her position to the outer world about disarmament and the League, and to keep up the interest of her own people in the work of the League. That desire is shown in the two publications[1] under review. The first is an English translation of a collection of essays on the German outlook upon questions of disarmament, which were published in a special number of the *Zeitschrift für Politik*. It supplements the essays in a similar number of the *Zeitschrift,* which appeared at th beginning of the Geneva Disarmament Conference. It is the aim of the essays to set out fully the reasons that justify Germany's withdrawal from the Conference," not only because of the latter's refusal to concede equal terms, but as much because of its systematic obstruction to general disarmament and the utter futility of the procedure employed at and by the Conference." The German view of the matter is that there was, in fact, " open or disguised opposition actuated by unwavering determination not to disarm on the part of those elements whose goodwill would have been, and would be, indispensable to carry the work of the Conference to a successful conclusion." The criticism of the action of France is particularly rigorous. The essays include studies by Dr. Schwendemann on Germany's fight for equal rights and security ; by Dr. Grabowsky, one of the editors, on Germany's exit from the League of Nations ; by Professor Dr. Moldenhauer, the former Minister of Finance, on the Budgetary Limitation of Armament Expenditure.

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[1] *Disarmament and Equal Rights*. Edited by Richard Schmidt and Adolf Grabowsky. (Berlin : Carl Heymanns Verlag, 1934.) Pp. 284.

Volkerbund und Volkerrecht. Edited by Professor Dr. Freiherrn von Freytagh-Loringhoven. (Berlin : Carl Heymanns Verlag, April and May, 1934.)

The translation is at times somewhat laboured, but the sense is always sufficiently clear. The collection of essays has a valuable appendix of documents of the German Chancellor, the Foreign Minister, etc., about disarmament as well as the memoranda of the Great Powers. It has also a bibliography, or critical guide to the international literature on disarmament since 1931, compiled by Dr. Rohde. This comprises over sixty long, closely printed pages, and is no doubt comprehensive in regard to the German works. The English selection is less complete. We note the absence of any reference to the writings of Philip Noel-Baker.

The other work reviewed is a new monthly journal of international law, which is published under the auspices of the German Society for Questions of the League of Nations. The subjects dealt with in the first two numbers are laudably catholic in their contents, and include : Foundations of the Reform of the League ; the Generalization of the Rights of Minorities ; England and the East African Mandate ; the Statute of the Saar ; the Proceedings of the Disarmament Conference ; the Dispute about the Chaco ; and Observations on the Johnson Bill. It is also a happy feature of the new journal that it contains contributions by distinguished foreign jurists. The first number has an article by Professor Scelle, of Paris, and the second an article by Professor Webster, both on the Revision of the Covenant. The German articles and the editorial notes take a very definitely German standpoint, and the treatment of many of the questions cannot be regarded as entirely objective and impartial. Thus it is notable that, in the account of the discussion on minorities at the Sixth Commission of the League Assembly last October, there is complete silence about the resolution accepted by all but the German members of the Commission, which repudiated any discrimination of civil rights against any minority of race or religion; and in the article about the Saar Statute there is complete silence about the desires of political and racial minorities in the region. But if international law and the League are looked on from a national standpoint, it is to the good that the German public is still interested in the scientific discussion of international questions.

N. B.

FOREIGN LEGAL SYSTEMS.

THE volume on Spain is the fifth of this excellent series.[1] Those which preceded it on Belgium, Czechoslovakia, France and Rumania have been reviewed in these columns.[2] This one, fortunately for the editors and for us, comes out after the promulgation of the new Spanish Constitution and of the Statute for Catalonia of September 15, 1932.

The chapter on the Constitution, contributed by Professor Rafaël Altamira, the historian of Spain, is of quite peculiar interest. The framers of the new Constitution ratified by the Cortes on December 2, 1931, had great difficulties to face. If the Constitution were to be accepted it had to show firmness in dealing with some matters highly controversial as to which there had been old and bitter quarrels. It had also to take account of the strength of regional feeling. The legislators knew well enough the ferocity of party spirit in Spain, and the violence of local patriotism.

It was felt that under the monarchy centralization had been carried too far. On the other hand, there was the risk of home-rule paving the way to separation. If the country was to be held together the best chance seemed to be to dismiss the idea of federation and to proclaim the unity of the State, while at the same time making provision for a large measure of home-rule in those "regions" which for centuries had enjoyed *privilegia* or, in the Spanish terminology, *fueros*. The Spanish Constitution was *periculosæ plenum opus aleæ* and the *ignes suppositi* are very near the surface.

The Constitution grapples stoutly with some of the problems. A firm attempt is made to put an end to the ancient conflict between Church and State, and the provisions which aim at securing the supremacy of the State are extremely drastic. There is to be no State Church. The parish priests, after two years, are to get no stipends from the State. The religious Orders are prohibited from having schools. Those Orders which impose on their members a special vow of obedience to an authority other than the State are to be dissolved, and also any Orders which are a danger to public security. The Orders are prohibited from carrying on trade or industry, their right to hold property is strictly limited, and there are other restrictions.

In marriage there is to be equality of rights between the sexes, and divorce *a vinculo* is to be permitted on the ground of reciprocal disagreement or on the demand of one spouse on proof of a legal ground of divorce against the other. The provisions of the Constitution have been supplemented by a law on divorce of March 2, 1932, and a law on civil marriage of June 28, 1932. As to marriage and divorce, the information given in this book is disappointingly meagre.

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[1] *La Vie Juridique des Peuples*, No. 5, *Espagne*. (Paris: Delagrave, 1934.) Pp. ix + 372.

[2] *Belgium*, Third Series, vol. xiv., p. 157; *Czechoslovakia*, vol. xv, p. 154; *France ibid.*; *Rumania*, vol. xv, p. 292.

But if the Constitution is explicit enough in regard to the Church, it is somewhat vague as to various other matters. They are left to be dealt with by subsequent legislation.

The great peculiarity of Spain, and one of its charms, is that the various kingdoms and principalities which in the course of a long history came to be all subject to the King of Spain, and now form part of the Republic, have preserved so deep a sense of their separate existence. Each of them has traditions and customs of its own. Some of them have a distinct language, and all of them have a body of local law. These former States, or some of them, are the "regions" which under the Constitution may apply for home-rule, though the Constitution uses abstract language and speaks of adjoining provinces having certain characteristics in common. But the administrative and financial arrangements to be made present obstacles. The Catalan statute has been passed, but its coming into effect is delayed. And it appears that the Basques, or at least many of them, do not want regional autonomy under the new Constitution. They have as much home-rule as they need, and have at present a financial arrangement with Madrid—the *Concierto Económico*—which they regard as more favourable to them than the terms they would get under the new scheme.

The Constitution, be it remembered—does not take away the special laws—*fueros*—from those territories which enjoyed them. The Spanish Civil Code (*Codigo Civil*), except for a few general provisions, by no means applies to the whole territory. In many provinces and cities the local law—*derecho foral*—still prevails. In fact, the Code is sometimes spoken of as the Civil Code of *Castile*. In Aragon, Catalonia, Navarre, the Basque Provinces and the Balearic Islands the local laws and customs hold the field.

The effect of legislation as to matters outside the Code, and especially as to commercial law, has created some uniformity. And the decisions of the Supreme Court at Madrid have had a unifying tendency. But there are still great divergences. In Spain, as in pre-Revolution France, the differences among provincial laws are particularly striking in regard to the patrimonial effects of marriage. The various types of matrimonial regime—dotal system, community of goods, community of *acquêts* and so forth—are still found in one region or another.

There is a great deal in this book to repay study. Special mention may be made of the chapter on International Relations by Professor J. M. Trias de Bes, of Barcelona. It is interesting to note that Art. 24 of the new Constitution opens the door to double nationality in some cases. Portuguese, Brazilians and citizens of Spanish-American countries who reside in Spain may acquire Spanish nationality without losing their own, provided, however, that their countries reciprocate.

F. P. W.

LEO V. PETRAZYCKI.[1]

THIS book has had to wait long for its publication. We learn from the short introduction that the International Academy of Comparative Law had already decided unanimously in 1928 to include two works of its original member, Leo von Petrazycki, in the series of its publications. Only now, five years later, three years after Petrazycki's death, and a full quarter of a century since the work was first published, has the Academy been able in part to fulfil its promise, thanks to the financial help of the Petrazycki Society in Warsaw. Thus the first step is taken towards introducing the chief work of Petrazycki to the Western Science of Law. It was first published 1906–7 in St. Petersburg in Russian, where Petrazycki occupied for twenty years the chair of Philosophy of Law. Ignorance of the Russian language has prevented Western legal science from profiting by Petrazycki's ideas. It remains to be hoped that the publication of the " Methodology " will be an encouragement to the publisher and will enable him to publish also a translation of the comprehensive " Theory of Law."

The first works of Petrazycki,[2] which were published in Germany in the nineties, deal with questions of Civil Law. They were produced, so to speak, in the laboratory, where the German Code of Civil Law was being prepared. Concern with the question as to which institutions should be recommended to the makers of the law and the reasons for doing so, and which institutions should not be recommended, led Petrazycki to general considerations as to the need to complete the system of historical and dogmatical Legal Science, which is concerned with facts, with legal rules existing or superseded, by a new branch of science, the Politics of Law, *i.e.* Civil Politics, the task of which should be to determine on the basis of special investigations that " which ought to be " in law. This branch of the Science of Law should be devoted to the same tasks as those which the old natural law tried to cope with, though employing different means. In a certain sense it was therefore a call for the " Return to Natural Law."

This science can, however, only be based on those materials which are found by observation of the effects of legal principles and especially their effect on human behaviour. A science of this kind, however, does not exist and cannot easily be constructed. For it presumes a scientific understanding of the phenomena of law, of law in general ; the present doctrine of law suffers from such errors and misunderstandings that it cannot serve as a basis for this new branch of the science.

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[1] *Methodologie der Theorien des Rechts und der Moral. Zugleich eine neue allgemeine logische Lehre von der Bildung der allgemeinen Begriffe und Theorien.* Travaux de l'Académie Internationale de droit comparé. (Paris : Librairie du Recueil Sirey, 1933.) pp. 132.

[2] *Die Fruchtverteilung beim Wechsel des Nutzungsberechtigten*, Berlin, 1892 ; and *Die Lehre von Einkommen*, Berlin, 1893.

Thus the problem of the Civil Code led up to Philosophy of Law, the particular problems to the great problem of law in general.

Petrazycki has explained his doctrine of law in his two volumes of *The Theory of Law, of the State and of Morals, based on Experience.*[1] This work was prefaced by an " Introduction " which consisted of a methodological and psychological part. In the latter Petrazycki made the attempt to differentiate and systematize anew psychological experience, realizing that no adequate understanding of our psychological life is possible on grounds of psychology as at present understood. The first part is the book lying before us.

Petrazycki has developed here his method, which may be called " empirical and psychological." He starts from the basis that the following are necessary for the successful construction of a science of any kind :

(1) An appropriate, methodical, concrete, *i.e.* based on experience, research and understanding of concrete-individualistic objects ; knowledge and application of suitable means and methods of experience of such a concrete-individualistic research ; and the acquisition of reliable material of experience.

(2) Formation of appropriate general classificatory ideas and judgments (theories), *i.e.* knowledge and application of a suitable method of the establishment of general ideas and theories.

Accordingly the Methodology of the Science of Law should consist of two parts : the understanding of concrete legal phenomena in the light of experience, and the understanding of the formation of the appropriate categories and theories.

The sphere of the existence of the phenomena of law is, according to Petrazycki, exclusively human psychology. The concrete phenomena of law are only to be found in the perception of those who experience or express corresponding convictions, opinions, etc.

The events of law are, therefore, a psychological process of a special kind which are more closely investigated and defined in the psychological part of the " Introduction." The method which has to be assisted by use of observation must therefore be the introspective—the simple and experimental—method, based on the observations of movements and conditions in others. This method is the only means by which the phenomena of law can be recognized. Apart from it there is no possibility of its understanding.

Petrazycki next proceeds to develop the characteristics of the introspective method and to explain its use. Lack of space prevents further reference here to this part of his subject.

As regards the doctrine of the formation of general ideas and theories Petrazycki also opens out new vistas. He renounces the traditional ideas of the logicians as to formation of general ideas by abstraction, and explains that the method which they recommend is based on a misinterpretation of the nature of a class.

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[1] The reviewer hopes to return to the subject of this theory in the near future.

These classes are far from embracing actually existing objects only. All objects of thought which can be conceived as possessing the appropriate *differentia* are included within them. For every idea according to the scheme—everything which is shown to possess the characteristic A—forms a class idea. The objects of such ideas form a corresponding class.

Only those classes and class ideas are, however, of importance and value to science as to which adequate scientific theories are existing or can be formed. By this we should understand theories in which that which is predicated is true in regard to the class of objects for which it is asserted, so that the statement is neither equally true for a higher, more extensive class, nor for a species or subspecies of the class in question, but is true only for the class itself.

At the same time it is not sufficient for the formation of a correct theory merely to record what exists. This form of research, the mere statement of that which has been ascertained as actual, is a suitable method for concrete and descriptive sciences. It does not suffice for a science of classes. Here it is necessary to determine that there exists a logical or causal connexion between the specific characteristics (*differentia specifica*) of one class of objects (the theoretical object) and something else, viz. that which was stated as to this class, *i.e.* the theoretical predicate.

The specific differences of classes play an important part in the scientific methodological foundations of theoretical sciences; they are the true *fundamenta theoriæ*. The contents of a scientific theory must consist in the presentation of that which is logically or causally connected with the *differentia specifica* of the class under observation, as well as in the explanation and proofs of these connexions.

I must confine myself to these short indications of Petrazycki's Methodology. They suffice, however, to show how independently and profoundly Petrazycki proceeded in the examination of the fundamental problems of theoretical knowledge. The publication of this work should be most warmly greeted. It can be recommended not only to jurists concerned with general legal problems, but also to moralists and to students of sociology and philosophy. Last, but not least, the pure logician will find here an abundance of new ideas which will serve to enrich his thought.

E. HASKIN.

ENCYCLOPÆDIA OF MODERN CIVIL AND COMMERCIAL LAWS.[1]

THIS great work, of which earlier instalments have been noticed, continues to make steady progress.[2] The last part contains, *inter alia*, valuable studies on minority, law of neighbours, law of surnames and Company Law.

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[1] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, herausgegeben von Dr. Franz Schlegelberger, vol. v to Offene Handelsgesellschaft. (Berlin: Vahlen.)

[2] See *Journ. Comp. Leg.*, Third Series, vol. xvi, p. 172.

It is not a book which lends itself to review, but it is emphatically one which ought to be purchased by those who are concerned with the laws of various countries. It is written by competent experts working according to a plan, and it gives at the end of each article a useful bibliography.

F. P. W.

We have also to acknowledge:[1]

The Spanish Origin of International Law. Part I, *Francisco de Vitoria and his Law of Nations.* By James Brown Scott. (London: Humphrey Milford, Oxford University Press.) Pp. 274 + clviii. 15*s*.

The Laws of India and Burma. Parts XXXII–IV, *Moveable Property.* By A. Eggar, M.A. (Oxford: John Johnson.)

International Survey of Social Services. (London: P. S. King & Son, Ltd.) Pp. xxiii + 688. 15*s*.

The Royal Empire Society. By Avaline Folsom, Ph.D. (London: Allen & Unwin.) Pp. 277. 10*s*. 6*d*.

Trends in Public Administration. By Leonard D. White, Ph.D. (London: McGraw-Hill Publishing Co., Ltd.) Pp. x + 365. 24*s*.

A Way to Social Peace. By H. Wickham Steed. (London: Allen & Unwin.) Pp. 148. 4*s*. 6*d*.

Financial Control and Integration. By George C. S. Benson. (New York: Harper & Brothers.) Pp. vii + 68. $1.50.

The Annual Register. Ed. by M. Epstein. (London: Longmans, Green & Co. Ltd.) Pp. xii + 312 + 184. 30*s*.

The Treaty of Trianon and European Peace. By Count Stephen Bethlen. (London: Longmans, Green & Co., Ltd.) Pp. xii + 187. 10*s*. 6*d*.

Human Sterilization To-day. By Cora B. S. Hodson. (London: C. A. Watts & Co., Ltd.) Pp. vii + 55. 1*s*.

Annual Survey of English Law, 1933. London School of Economics. (London: Sweet & Maxwell, Ltd.) 10*s*. 6*d*.

Some Aspects of the Covenant of the League of Nations. By Sir John Fischer Williams, C.B.E., K.C. (London: Humphrey Milford, Oxford University Press.) Pp. vii + 322. 10*s*. 6*d*.

German Commercial Policy. By Wilhelm Röpke. (London: Longmans, Green & Co., Ltd.) Pp. viii + 86. 5*s*.

Consultation and Co-operation in the British Commonwealth. By Gerald E. H. Palmer. (London: Humphrey Milford, Oxford University Press.) Pp. lix + 264. 12*s*. 6*d*.

Declaratory Judgments. By Edwin Borchard. (Cleveland: Banks-Baldwin Law Publishing Co.) Pp. xxii + 669.

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[1] Mention here does not preclude a review later.

Roman Law in Modern Practice. By James Mackintosh. (Edinburgh: W. Green & Son, Ltd.) Pp. xii + 202.

A Better League of Nations. By F. N. Keen. (London: Allen & Unwin.) Pp. 160. 5*s*.

L'Auteur et la Radiodiffusion. By Robert de Leusse. (Paris: Recueil Sirey.) Pp. 171. Frs. 20.

Un Parère de Jurisprudence Comparative. By Edouard Lambert. (Lyon: Bosc Freres, M. & L. Riou.) Pp. xl + 221. Frs. 30.

Une Fuite dans les Institutions de Paix. By Edouard Lambert. (Lyon: Bosc Freres, M. & L. Riou.) Pp. 71.

Droit privé de la Radiodiffusion. By Louis C. Bollecker. (Paris: Recueil Sirey.) Pp. ix + 254. Frs. 36.

Le Controle Juridictionnel de l'Administration. By Roger Bonnard. (Paris: Librairie Delagrave.) Pp. 266. Frs. 35.

Annales de l'Institut de Droit Comparé de l'Université de Paris. (Paris: Recueil Sirey.) Pp. 325. Frs. 40.

Essai sur le Travail Parlementaire et le Système des Commissions. By Joseph Barthélemy. (Paris: Librairie Delagrave.) Pp. 372. Frs. 50.

Annuaire Interparlementaire, 1934. *La Vie Politique et Constitutionnelle des Peuples.* (Paris: Recueil Sirey.) Pp. 244. Frs. 30.

Le Crédit Documentaire en Droit Anglais. By Jean Demogue. (Paris: Rousseau et Cie.) Pp. 339. Frs. 40.

La Réalité des Normes. By Hans Morgenthau. (Paris: Librairie Felix Alcan.) Pp. xi + 251. Frs. 30.

Annuaire de l'Institut International de Droit Public. (Paris: Les Presses Universitaires de France.) Pp. 871. Frs. 140.

Internationales Finanzrecht. By Dr. jur. Ernst Isay. (Stuttgart: W. Kohlhammer.) Pp. v + 285. RM. 15.

Deutschlands Gleichberechtigung als Rechtsproblem. By Viktor Bruns. (Berlin: Carl Heymanns Verlag.) Pp. 35. RM. 1.

Der Rechtserwerb. By Dr. Konrad Duden. (Berlin: Walter de Gruyter.) Pp. 137.

Die Trennung der Gewalten und das germanische Recht. Band I, *Richterliche Rechtsschöpfung und Monopolproblem.* By Dr. Theodor Kuhr. (Mannheim: Deutsches Druck- und Verlagshaus.) Pp. ix + 192. RM. 8.50.

"*Lex Facit Regem.*" By Professor Dr. August Simonius. (Basle: Hebling & Lichtenhaben.) Pp. 89. Frs. 3.

Internationale Strafgerichtsvarkeit. By Professor Dr. H. von Weber. (Berlin: Ferd. Dümmlers Verlag.) Pp. 176. RM. 8.

Internationales Jahrbuch für Schiedsgerichtswesen. Bd. IV. (Berlin: Carl Heymanns Verlag.) Pp. 180. RM. 18.

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht. Band IV, Parts 1 and 2. (Berlin: Walter de Gruyter.) Pp. 480. RM. 25.

Die Rechtsprechung des Kartellgerichts. Part II. By Dr. Hans Klinger. (Berlin: Carl Heymanns Verlag.) Pp. 101. RM. 7.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin Mensuel de la Société de Législation Comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Gold Coast Review; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; South African Law Times; South African Law Journal; Studi di Diritto Industriale; Tulane Law Review; University of Illinois Studies in the Social Sciences; Wisconsin Law Review; Zeitschrift für Ostrecht.